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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-6

In re Application of

NORMANDY BROADCASTING CORP. File No. BRH-910129UR

For Renewal of License of
Station WYLR(FM)
Glens Falls, New York)

and

LAWRENCE N. BRANDT File No. BPH-910430MB

For a Construction Permit
for a New FM Station on 95.9 MHz
at Glens Falls, New York

Appearances

Christopher P. Lynch, Pro Se for Normandy Broadcasting Corp.; *David Tillotson, Esq.* and *Kathleen L. Franco, Esq.*, on behalf of Lawrence N. Brandt; *Charles E. Dziedzic, Esq.*; *Y. Paulette Laden, Esq.*, and *Gary P. Schonman, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: December 18, 1992; Released: December 30, 1992

PRELIMINARY STATEMENT

1. This proceeding was commenced on January 21, 1992, by *Hearing Designation Order*, DA 92-11, reported at 7 F.C.C. Rcd 509 (MM Bur. 1992) ("*HDO*"), setting down for hearing the application of Normandy Broadcasting Corp. ("Normandy") the renewal of its license for Station WYLR(FM) ("WYLR") at Glens Falls, New York and the mutually exclusive application of Lawrence N. Brandt ("Brandt") for a construction permit for a new FM station to operate on the same frequency as WYLR. The Commission was represented in the proceeding by the Mass Media Bureau ("Bureau").

2. An issue was designated by the Bureau on a possible hazard to air navigation relating to the location and the height of Brandt's proposed antenna. The issue was resolved in Brandt's favor by an interlocutory ruling of the Presiding Judge which was based on an unopposed motion. *See Order* FCC 92M-200, released February 13, 1992. Three other issues set in the *HDO* were tried at hearing and are initially resolved herein. The issues are:

> a) To determine whether the findings and conclusions about the character qualifications of Normandy in *Barry Skidelsky*, 6 FCC Rcd 2221 (ALJ 1991), should disqualify Normandy in the Glens Falls renewal proceeding.[1]
>
> (b) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> (c) To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

3. Normandy was a mutually exclusive applicant for an FM permit for a new station that had been allocated to Queensbury, New York (MM Docket 90-181). The case was designated for hearing on March 15, 1990, and thereafter went to hearing. Administrative Law Judge Edward J. Kuhlmann found Normandy to be disqualified for having provided untruthful information in its threshold showing of the non-entertainment programming of WYLR, for misrepresenting its reasonable assurance of a transmitter site, and for having failed to disclose a creditor's contingent ownership interest in Normandy. *Barry Skidelsky*, 6 F.C.C. Rcd 2221 (Admin. L.J. 1991). The Review Board affirmed Normandy's disqualification for lacking reasonable assurance of a transmitter site. *Barry Skidelsky*, 7 F.C.C. Rcd 1 (Review Bd 1992). But the Review Board declined to review the character issues that had been decided against Normandy and held in that regard:

> Because Normandy is disqualified on the basic site issue, we need not go further to determine whether Normandy's conduct amounted to misrepresentation.

Id. at 8 (footnote omitted). The Review Board denied the Bureau's petition for reconsideration of its refusal to review Normandy's character issues. The Review Board was aware that this renewal proceeding had been commenced and held that the character issues decided against Normandy in Queensbury are "now more directly relevant to the WYLR(FM) renewal proceeding." *Barry Skidelsky*, 7 F.C.C. Rcd 1392-93 (Review Bd 1992) (hereafter "*Skidelsky Recon.*"). However, the Review Board instructed that the Presiding Judge in this proceeding "should not relitigate the programming misrepresentation issue tried in this instant [Queensbury] proceeding." *Skidelsky Recon.* at 1393. It is noted that in the course of the appeal, Normandy sought review only of the transmitter site issue which was the only issue that the Review Board has addressed. Normandy had not sought review of the misrepresentation issues which the *Skidelsky* judge had found against Normandy. On April 3, 1992, Normandy petitioned for dismissal of its application in Queensbury.

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[1] The Skidelsky issue as set in the *HDO* was modified by the Presiding Judge to conform to a later ruling of the Review Board which was made after issuance of the *HDO*. *See Order* FCC 92M-281, released March 26, 1992, and the Review Board's ruling at 92R-16, released February 19, 1992, and published at 7 F.C.C. Rcd 1392 (Review Bd 1992).

4. The Review Board gave procedural direction to the course of the litigation of this renewal case. In *Ocean Pines FM Broadcasting Partnership*, 4 F.C.C. Rcd 3490 (Review Bd 1989) the Review Board held that the presiding judge in that case did not err in adding an issue which would take into account the real party-in-interest findings and conclusions of another judge who had presided in a parallel proceeding. The Review Board stated in its *Skidelsky Recon.* ruling that the same protocol should be employed here.

5. After the *Skidelsky Recon.*, Brandt filed a motion for summary decision on the Skidelsky issue and asked that Normandy be declared unqualified without further hearing. The motion was denied by the Presiding Judge because there remains to be considered any additional evidence that Normandy believes to be exculpatory. *See Memorandum Opinion and Order*, FCC 92M-560, released May 15, 1992. The Review Board acknowledged in its *Skidelsky Recon.* that "exculpatory" evidence would be relevant to the issue of Normandy's qualifications to hold a broadcasting license.[2] *See Skidelsky Recon.*, 7 F.C.C. Rcd at 1393, Para. 10. Such evidence was received in the hearing phase of this case while adhering to the standard of collateral estoppel with respect to the Skidelsky issue on Normandy's character.

6. An admissions hearing session was held on August 4, 1992, which was limited to the receipt of documentary evidence, rulings on the permissibility of cross-examination of certain non-party public witnesses, the scope of proposed exculpatory evidence, and any possible rebuttal of such evidence. *See Order* FCC 92M-850, released August 7, 1992. *See also Order* FCC 92M-920, released August 27, 1992 (permitting speakerphone cross-examination of two non-party witnesses and requiring in court cross-examination of two non-party witnesses). A testimonial hearing was held on September 1, 1992, and the record was closed on that same date. *See Order* FCC 92M-931, released September 3, 1992. The parties were required to submit their proposed findings of fact and conclusions of law ("PFC") on October 9, 1992, and their reply findings and conclusions ("RPFC") on October 30, 1992. The Bureau's PFC was limited to the *Skidelsky* issue and renewal expectancy, and the Bureau did not file any RPFC.

FINDINGS OF FACT

7. The burden of proof with respect to the exculpation of Normandy from the disqualifying findings and conclusions on the *Skidelsky* issue remains with Normandy. Therefore, Normandy must show by the preponderance of the evidence that its operation of Station WYLR(FM) during the relevant renewal period was sufficient to offset the adverse findings of character disqualification that were made in *Skidelsky*. *See KQED, Inc.* 5 F.C.C. Rcd 1784-85 (Comm'n 1990) [subsequent history omitted] (Comm'n findings of misrepresentation concerning one station does not require denial of renewal for other stations but meritorious programming will not mitigate serious deliberate misconduct such as misrepresentations to the Commission). *See also* Presiding Judge's *Memorandum Opinion and Order*, FCC 92M-560, *supra*. A consolidated factual hearing was conducted on all issues wherein the parties presented evidence and were afforded the opportunity to conduct cross-examination. *Ashbacker Radio Corp.* v. *F.C.C.*, 325 U.S. 327, 333 (1945); *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956) (parties to comparative broadcast hearings have right to present oral and documentary evidence and to conduct cross-examination).

The Applicant Parties

Normandy Broadcasting Corp.

8. Normandy is a New York corporation all of whose stock is owned by Christopher P. Lynch ("Lynch"). (Normandy Exh.1.) Normandy is the current licensee of FM Station WYLR and of Am Station WWSC, Glens Falls, New York ("WWSC"). (Brandt Exh.2.)

9. Lynch intends to continue to devote forty hours or more per week as the general manager of Station WYLR(FM). (Normandy Exh.2.) Lynch has been a resident of Queensbury, New York, a community which is within WYLR's service area, since 1984. He has owned and operated Station WYLR(FM) since 1984. Lynch's civic activities include the Vietnam Veterans of America for which he served as chairman of the board from 1975 to 1978. Lynch also served on the board of directors of Planned Parenthood and the Lower Adirondack Regional Arts Council with whom he holds an honorary lifetime membership. (Normandy Exh. 3, Pp.1-6.) Additional civic involvements of Lynch are set forth in Paras. 29, 33 below.

10. Normandy will continue to provide auxiliary power for Station WYLR(FM) and Normandy is in the process of acquiring an emergency generator for WYLR's tower site. (Normandy Exh. 5.)

Lawrence N. Brandt

11. Brandt is an individual applicant. If his application is granted, Brandt will own and operate the station as sole proprietor. (Brandt Exh.1.) He does not propose to be integrated into the day-to-day operations of the station. (Id.)

12. Brandt will install auxiliary power generators at both the transmitter and studio sites of the station to ensure that the station will be able to remain on the air in the event of a power failure. (Id.)

Diversification

13. Normandy has not made any commitment to divest itself of WWSC and Normandy has represented on-the-record that it intends to continue to own and operate WWSC if its renewal for Station WYLR(FM) is granted. (Admission Sess. Tr. 237.)

14. Brandt has interests in multichannel multipoint dis-

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[2] Evidence was received which might also be characterized as mitigating evidence. "Exculpate" means excuse or justification while "mitigation" means an abatement or diminution of a penalty. *Black's Law Dictionary* (4th Ed) at 675, 1153. *Compare Skidelsky Recon* . at 1393 (additional evidence that is "exculpatory") and *United Broadcasting Co.*, 86 F.C.C. 2d 452, 459 (Comm'n 1981) (United may introduce "mitigating" evidence). For purposes here the terms "exculpation" and "mitigation"

tribution systems ("MMDS")[3] in five communities: Cleveland, OH; Buffalo, NY; Elmira, NY; Columbus OH; and Florence, SC. He has no other interests in a means of mass communications. (Brandt Exh.1.)

The Skidelsky Issue

15. Character issues were set by the *Skidelsky* judge against Normandy and the following summary conclusions were made:

> (a) Normandy has not demonstrated that it had reasonable assurance for its first antenna site; its certification that it did have reasonable assurance was not corroborated by any evidence outside of the testimony of Christopher Lynch.
>
> (b) Normandy's threshold showing on its non-entertainment programming was carelessly prepared; it could not be relied on and was in material respects untruthful.
>
> (c) Normandy failed to report a contingent ownership interest and Mr. Lynch's explanation for not doing so is disingenuous.

Skidelsky, 6 F.C.C. Rcd 2221, 2228-30 (Admin.L.J. 1991). The judge concluded with respect to the totality of Normandy's fitness for a license:

> Normandy is disqualified to operate the proposed Queensbury facility because it has not established that it can be relied on to provide truthful information to the government.

Id. at 2232.

16. The Review Board addressed only the merits of the findings and conclusions insofar as they determined that Normandy did not have a reasonable assurance of a site when it certified affirmatively in its Form 301. *See* 7 F.C.C. Rcd, *supra* at 1-2. Since on appeal Normandy was found to be basically unqualified, the Review Board specifically declined to review the record to determine whether Normandy's conduct with respect to its certification of a reasonable assurance "amounted to misrepresentation." *Id.* at 8. In a related footnote, the Review Board advised that because it found Normandy unqualified in that it lacked a transmitter site, it need not and would not reach the issues raised on appeal with respect to site certification, threshold showing, and undisclosed contingent ownership interest. *Id.* 8 fn.12. Therefore, under principles of collateral estoppel and the issue added by the Review Board, Para. 2, *supra*, the findings and conclusions of Judge Kuhlmann with respect to Normandy's character and truthfulness as they relate to the three subjects of site certification, threshold showing, and disclosure of contingent ownership interest are adopted as written. *See* 6 F.C.C. Rcd at 2221-2232. *See also* Fn.9 , *infra*.

Exculpatory/Mitigating Evidence

17. The bureau refers to favorable evidence of Normandy's "service on behalf of a large number of community organizations." Specifically, the Bureau cites evidence of Lynch's participation in community activities and his honorable voluntary service in the United States Army. (Normandy Exh. 3 at Pp. 2-3, 5-6 and 61.) The Bureau also refers to Normandy's reliance on its "efforts to ensure and improve compliance with Commission rules and policies " which include attendance at a conference of the National Association of Broadcasters ("NAB"). (Normandy Exh. 8.) The Bureau urges that such evidence sufficiently mitigates the misrepresentations in *Skidelsky* to warrant a renewal of Normandy's license to operate Station WYLR(FM). *See* Bureau's PFC at 5, 8-11.

18. Normandy relies on evidence which it introduced concerning its programming record. (Normandy Exh.6.) Normandy also cites to a sworn statement of Lynch which was rejected because it attempts to relitigate the Skidelsky issues. (Normandy Exh. 7 for id.; Tr.415-18.) Normandy will not be permitted to rely on evidence which the Review Board has excluded from consideration in order to attempt to meet its burden of proof on exculpation. However, evidence of the scope and efforts of Normandy's ascertainment that occurred within the renewal period will be considered in conjunction with evidence of exculpation and mitigation. (*See* Para. 62 and n.11, *infra*.)

19. The consideration of Normandy's evidence on exculpation and mitigation was subject to certain evidentiary rulings which excluded portions of Normandy's Exh. 6, a document entitled "Programming Record" that related to the renewal expectancy. (*See* Tr.352-416.) Unless specifically indicated otherwise, the findings in Paras. 20-23, *infra* are based on Normandy Exh. 6. Because of the credibility issues raised by Brandt about the accuracy and reliability of Normandy's programming records that are relied upon by Normandy for exculpation and mitigation, these preliminary findings in Paras. 20-23 are selected by the Presiding Judge from Normandy Exh. 6 to explain how Normandy is structured and functions in furtherance of the public service responsibilities of Stations WWSC(AM) and WYLR(FM). To the extent such evidence shows a likelihood of WYLR's future truthfulness, candor or competence in dealings with the Commission it will be considered in mitigation.

20. The evidence shows that Station WYLR(FM) operates full time and broadcasts an entertainment format that is directed to an audience of young adults. Stations WWSC(AM) and WYLR(FM) have co-located studios at the same address in Glens Falls. The stations simulcast on a limited basis whereby they share common news, engineering and administration personnel. Lynch owns and manages both stations. Lynch asserted that the "bulk" of WYLR's public service announcements ("PSAs") were broadcast during "premium time" which was identified as being from 6:00 am to 7:00 pm. WYLR's service to the community includes regularly scheduled news, sports and weather. There are also PSAs to address "ascertained" community needs. Ascertainment for both stations is conducted by four members of Normandy's staff, including Lynch. During the renewal period Lynch and his staff claim to

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will be used interchangeably.

[3] A multichannel multipoint distribution system is a television delivery system utilizing line-of-sight microwave with four or more channels operated by a single owner, sometimes referred to as "wireless cable." *Channels Field Guide* 1988 at 130. *See* 47 C.F.R. §21.900 *et seq.* (Multipoint Distribution Service).

have interviewed fifty two public service organizations which are identified in the exhibit. Ascertainment is aided by actual participation of WYLR personnel in the activities of certain of the organizations and by being receptive to approaches from the organizations. (Normandy Exh. 6 at 3-4.)

21. Normandy emphasizes local news for both stations. The local news stories are written primarily by joint station staffers from independent research and by rewriting wire stories for the benefit of local listeners. For the purpose of gathering local news, Normandy contacts thirty identified sources such as police and fire departments and the mayor's office. Over the license term, WYLR broadcasts 55 local newscasts each week. These newscasts are referred to as "formally logged news". In addition, Normandy represents that it integrates "non-logged news items" into Normandy's daily format.

22. Normandy's stations are located in an area of the country which experiences bad weather conditions. Station WYLR(FM) regularly broadcasts emergency news about traffic and road hazards, weather emergencies, and power outages. To meet these needs, Normandy contracts with a private weather forecasting service which provides WWSC and WYLR with regular forecasts and severe weather warnings. To further address these needs, Normandy has formulated for the two stations, through a common public service director, a system for warning area residents of ensuing storms. Normandy's system involves assigning each local school a coded password which facilitates the reporting of school and business closings and meeting postponements. On extremely busy bad weather days, WYLR(FM) covers the weather developments through its news programs, special reports and ongoing live coverage.

23. WWSC and WYLR share a common public service director who is responsible for taping local PSAs, for procuring national and state PSAs, and for planning the running of the PSAs. Station WYLR(FM) runs about 100 PSAs per week, some of which are taped and some of which are live. Each PSA runs for about 30 seconds and the PSAs for local service organizations account for approximately fifty percent of Station WYLR's PSAs.

24. This background on Normandy's PSA methodology will now be considered in the light of specific criticisms of Brandt. Brandt accurately states that the evidence which is advanced by Normandy to mitigate the *Skidelsky* findings consists solely of information concerning Normandy's program service. *See* Brandt's PFC at 4. Brandt further argues that the programming service that Normandy proposed over Station WYLR(FM) was not "meritorious" and would best be described as "minimal" in its providing for a public service. *Id.* at 4-5. It is noted that Brandt concedes that Normandy did in fact interview community leaders, members of the general public, and various groups and agencies in the Glens Falls area for ascertainment purposes. Brandt PFC at 7.

25. Normandy has introduced evidence of its issues/programs lists in its Exh.6 at Pp. 14-22. There, Normandy has set forth in columnar form: Name of Program, Dates, Days Per Week, Approximate Hours Per Day, Description. Through discovery, Brandt has reviewed Normandy's quarterly issues/programs lists which were the source for Normandy's schematic representation. Brandt prepared as his responsive exhibits: Brandt Exhs. 3,4,5. It is established by Brandt's evidence that in 1984 and 1985, there were no records of PSAs being broadcast on Station WYLR(FM). (Brandt Exh.3.) Normandy responds in its RPFC that Brandt has mischaracterized Normandy's programming. But Normandy fails to respond to the specific point raised by Brandt regarding the absence of PSAs in the issues lists for programs in those two years. The lists for 1986 and the first two quarters of 1987 also reflect no programs for the FM station. (Brandt Exh.3 at Pp.1-15.) The exhibit had been exchanged on July 16, 1992 (*Order* FCC 92M-752) and Lynch stated in testimony that he believed that the document accurately described Normandy's lists. (Tr. 519-20.) But Lynch would not concede that the lists, which were the business records of Normandy, were accurate in describing the scope of WYLR's broadcasting. For example, regardless of any absence of a reference to WYLR on a list, Lynch testified that wherever a holiday safe driving PSA was prepared by Normandy it was broadcast on both WWSC(AM) and WYLR(FM). (Tr. 528.)

26. Lynch testified in explanation on the Presiding Judge's *voir dire:*

> We have admitted, on our renewal application, that we did make some errors in our quarterly files ---. Obviously, there's some quarters where there isn't anything [on] FM. There are some quarters where things are, in my mind, very clearly missing, and the reason that we're going through this proceeding and Mr. Jacobson and Mr. Dusenbery are here, is to provide evidence that we did numerous things that did not show up either on the logs or the quarterly issues file.

(Lynch, Tr. 522-23.) Upon specific acknowledgement from Lynch that Brandt Exh.3 was based on records that relate to the programming of WYLR during the renewal period and was based on documents from the business files of Normandy, the exhibit was received in evidence. (Tr. 525.) The Bureau had no objection to its receipt in evidence. (*Id.*)

27. It is found that based on the Normandy records reflected in Brandt Exh.3 and the admissions of Lynch, there has not been a consistent broadcasting of PSAs on WYLR(FM) throughout the renewal period. This finding is consistent with a note in the *Skidelsky ID* where the trial judge found that "it is doubtful that Normandy carried any public affairs programming on WYLR." 6 F.C.C. Rcd at 2232 n.3.[4]

28. While Normandy relied on programming in its PFC as proof of mitigation, Normandy supplemented its broadcasting in its RPFC with additional reliance on proof of its upgraded logging techniques (citing general reference to Normandy Exhs. 6, 7 and 8); additional regularly scheduled public affairs programming over the license term; and "reams" of supporting letters, awards, and testimonials from the community. (Citing Normandy Exhs. 3, 9, and 11). *See* Normandy's RPFC at 2. The Bureau relies on non-broadcast evidence in support of Normandy's mitigation: service on behalf of a large number of community

[4] In *Skidelsky*, where there was evidence received on Normandy's poor broadcast performance, Normandy did not submit any contemporaneous records which would corroborate Lynch's anecdotal claims about PSA broadcasting on WYLR. *Id.*

organizations (Normandy Exh. 6 at Pp. 3-6); participation in community activities by Lynch (Normandy Exh. 3 at Pp. 2-6); and Lynch's honorable discharge from the United States Army (Normandy Exh.3 at p. 61 [DD Form 214]). *See* Bureau's PFC.

29. The evidence contained in Normandy Exh. 6 has been considered above. *See* Paras. 18-23. Other evidence discloses that Lynch enlisted in the United States Army in 1967, trained in a combat unit, and served in Vietnam. He was decorated for his military service and he was honorably discharged in 1970. (Normandy Exh.3.) In 1971, Lynch became full-time manager of Stations WWSC and WYLR. He acquired 100% ownership of Normandy in 1984. (*Id.*) The evidence relied on by Normandy in mitigation further reflects that Lynch works at the two Stations in excess of forty hours per week and he serves in several community organizations. (Normandy Exh.3 at Annex A.) Lynch was recognized by the Lower Adirondack Regional Arts Council in 1974, by the Post Stroke Patients Association in 1975, by the Warren County Heart Fund in 1974, by the Fort Edward Lyons Club in 1982, by the Adirondack Community College, by the Adirondack Chapter of the Vietnam Veterans of America in 1987, and by approximately twenty four other local organizations between 1988 and 1991. (Normandy Exh. 3 at Pp. 36-60.)

30. A sworn statement of Lynch (Normandy Exh. 7) was rejected as evidence because it was ruled to be a collateral attack on the *Skidelsky ID* findings. (Tr. 417.) The document consists of a two page sworn statement of Lynch wherein he admits to committing error with regard to the threshold evidence offered by Normandy in *Skidelsky*.[5] Specifically, Lynch admits to having understated WYLR's total entertainment by a factor of 32%. He admits to negligence in the preparation but denies an intent to deceive. But the findings in the *Skidelsky ID* go beyond a mere failure to count accurately. For example, it was found that Lynch was not concerned about the truthfulness of the written threshold showing because he assumed that accuracy would result through cross-examination since the other applicants were familiar with WYLR's programming. *Skidelsky ID* at 2223. Also, there were findings that a program that was exclusively run on the AM Station was misrepresented as also having been run on WYLR. *Id.* That is not the type of miscalculation error that Normandy advances in its rejected Exh. 7. Therefore, even if Normandy's Exh. 7 were received in evidence it would serve to enhance the *Skidelsky* findings and not exculpate or mitigate them.

31. Normandy also relies on evidence of Lynch's attendance at a NAB conference in February 1990. (Normandy Exh. 8.) The subject matter of the conference was compliance with the Commission's renewal procedures. Lynch represents that as a result of attending that conference he gave specific instructions to his receptionist, Mrs. Jackie Ingraham, to verify all items in Normandy's public files. As she checked items in the public file she was to mark a "yes" and Lynch would rely on Mrs. Ingraham's "yes" conclusions that the file was complete and accurate. Lynch testified at the admissions session in this case that a "Statement as to Attendance and Efforts to Upgrade Compliance" (Exh.8) shows that Mrs. Ingraham had reviewed the entire public Normandy public file and her "yes" entries next to the quarterly issues/programs lists were relied upon by Lynch. (Tr. 424.) Lynch is attempting to show that it was the fault of his receptionist that there was an erroneous threshold statement introduced in *Skidelsky* and that the situation was now corrected. The secretary in the *Skidelsky* findings was a Mrs. Trombley who had been an employee of Normandy for twenty years. The findings showed that Lynch did not review Mrs. Trombley's results for accuracy. *See Skidelsky ID*, Para. 17 at 2223. There is no showing in Normandy Exh. 8 that Lynch has instituted a better system to review the work of Mrs. Ingraham for accuracy. There is no reference in Normandy's pleadings to a review system that was put in place and implemented after *Skidelsky*. Nor was Mrs. Ingraham called to testify concerning the training she received after the *Skidelsky* findings which would be the kind of evidence that a fact finder would expect to be introduced to show mitigation. *Cf. Skidelsky ID* at 2230 (employees who made program analysis were not produced for examination).

32. Normandy also relies on letters of commendation which are contained in Normandy Exh. 3, Annex A, Annex B and Annex C; Normandy Exh. 9 at Pp. 1-18 and Normandy Exh. 11 at Pp. 1-27. (Tr. 480, 645.) The letters and affidavits in Exh. 3 and in Exh. 9 were not received in their entirety. There were a series of rulings which excluded portions of Exh. 3 because the laudatory matter pertained to WWSC or the evidence was unreliable or was unduly repetitious. (Tr. 300-344.) There was one instance of improper tampering by Lynch with an affidavit of Stephen Borgos. (Normandy Exh. 3 at 11.) Lynch had handwritten "WYLR" in two places even though the Borgos affidavit on its face was testimony only as to WWSC. Lynch admitted writing in "WYLR" without Borgos' knowledge after Borgos had signed the affidavit. (Tr. 290-91.) Lynch also had erroneously inserted the same affidavit of Mayor O'Keefe which had been used in the *Skidelsky* litigation. (Tr. 299-300.) With regard to Exh. 9, the affidavit of Thomas J. Wade was stricken because he was out of the country on the date previously set for his cross-examination, which had been authorized to be taken by speakerphone. The affidavit was dated July 9, 1992 and attests to Lynch's community involvement. The information was more relevant to the renewal expectancy than mitigation. Normandy merely refers generally to the documents in Exh. 3 and Exh. 9 and there is no attempt to put them in focus with respect to mitigation.

33. Exhibit 11 consists of twenty seven documents dating from December 31, 1985, to July 15, 1992. (Normandy Exh. 11, Pp. 1-27 is prefaced by descriptive listing.) There is no evidence that the documents, most of which are letters of commendation from persons in the community, were authored by persons who were aware of the negative findings in Skidelsky. Therefore, the evidence has only a marginal value of reliability for mitigation. Nor does Normandy show in its PFC or in its RPFC how any selective documents in Exh. 11 mitigate the disqualification findings in *Skidelsky*. For example, a letter of congratulations from a United States Senator for the receipt by Lynch of an NAB "Crystal Radio Award for Excellence in Local Achievement" does not directly or indirectly establish a nexus of mitigation for Normandy's untruthfulness in a threshold showing, or in a misrepresented site certification, or in failing to identify an undisclosed principal. However, it will be afforded some weight to show a positive reputation of Lynch in the community. Also, evidence in Exh. 11

[5] While the document was properly rejected as evidence in this case, it continues to be relied upon by Normandy in mitigation.

which is relevant in time will be considered under renewal expectancy and items reflected in Exh. 3 will be considered under mitigation: Lynch's honorable service in Vietnam, Lynch's civic activities in the community (cub scouts, YMCA, Vietnam Veterans of America Chapter 79, Tri-County Taxpayers Association, Tri-County Heart Association, American Heart Association). The Presiding Judge also considers a narrative summary of the civic activities (Exh. 3 at Annex A), certain of the letters and certificate awards (Exh. 3 at Annex B), and the documents attesting to Lynch's honorable military service (Exh. 3 at Annex C). The evidence was reviewed *seriatim* on-the-record and not all of the documents were received in evidence. (Tr. 300-350.) But all of the evidence received, even evidence which was principally offered to show civic activities related to Lynch's integration proposal, is taken into account for purposes of mitigation. (Tr. 293-94.)

Renewal Expectancy

34. The relevant time period for purposes of determining Normandy's entitlement to a renewal expectancy (the "renewal period") is the period from June 1, 1984, to April 30, 1991. (Tr. 520-21.) Findings with respect to exculpation/mitigation at Paras. 20-33, *supra* are incorporated by reference.

35. For renewal expectancy, Normandy contends that its evidence will show:

(a) Over the license period, WYLR broadcast news, sports and weather programming on a consistent basis.

(b) Over the license period, WYLR consistently broadcast PSAs, both live and produced, to answer ascertained problems of its community. (Tr. 661-62, 673-79, 696-97.)

(c) On an irregular but consistent basis, WYLR broadcast public affairs programming and/or interviews, many times integrally as part of its fundraising or sponsorships of community based events. (Tr. 610-633, 682-694, 710-12.)

(d) WYLR's nonentertainment programming averaged about 6% of its broadcasting time. (Tr. 567.)

(e) WYLR can point to numerous concrete examples of the positive effects of its public affairs programming. (Normandy Exhs. 3, 6, 9, 11.)

The record has been reviewed by the Presiding Judge to determine whether Normandy's contentions are supported by substantial evidence. It is found, for reasons detailed below, that WYLR did broadcast news, sports, weather and PSAs on a regular basis. Such broadcasting was substantially the same for WWSC and WYLR. But there is not substantial evidence of substantive nonentertainment WYLR programming that addressed ascertained local issues. And because of Normandy's inept record keeping, the percentage of nonentertainment broadcasting of WYLR cannot be ascertained with a reasonable degree of precision.

Renewal Programming

36. During unspecified portions of the renewal period, Lynch has caused Normandy to provide broadcast services for community events. Examples cited by Normandy are the Adirondack Balloon Festival, professional local ice hockey games, local professional baseball games, and the American Motorcycle Convention. (Normandy Exh. 3, Annex A.) Additional examples are set forth below. However, those services do not constitute specific programming on a regular basis of issues that were ascertained to be of interest to the community.

37. Lynch and Normandy have participated in fundraising for a new YMCA building, and publicized fundraising for the Chapman Historical Museum and the art assembled for the Hyde Collection. Lynch and Normandy have assisted through broadcasting the Lake George Arts Project, the Glens Falls Symphony Orchestra and miscellaneous children' concerts. (Normandy Exh. 3, Annex A.) Normandy also assisted in raising funds to address a local rise in heart related illnesses and deaths, participated in garage sales with an "Operation Santa Claus," and broadcast announcements about the availability of vans to assist unemployed veterans. (*Id.*) Normandy has supported walkathons for cerebral palsy, Girl Scout cookie drives, muscular dystrophy sports tournaments, and church barbecues. (*Id.*) Normandy has sponsored the Lions Drum Corps International Competition which raises money for the sight-impaired. (*Id.*)

38. Although the evidence (Normandy Exh. 3, Annex A) does not make specific reference to dates within the renewal period, there is general reference to the past 10 to 20 years in which the services occurred. Also, testimony of a witness who was Program Director and Operations Manager to WYLR in 1989, corroborates Lynch's representations concerning fund raisers, Walk America, and Easter Seals which were broadcast locally on-the-scene. (Tr. 665-67.)

39. In the course of cross-examination, counsel for Brandt asked questions about PSA programming on WWSC which was not logged for WYLR. Lynch testified that in April and May 1986, newscasts on environmental problems were run on both stations. In August 1986, there was coverage on WYLR of a protest of dairy farmers. (Brandt Exh. 3 at 13-14, Tr. 527.) In November 1986, WYLR carried newscasts about police patrols and a new housing development. (Brandt Exh. 3 at 6; Tr. 527.) In January 1987, both stations carried newscasts about a local dog pound and another housing project. (Brandt Exh. 3 at 11, Tr. 528.) WYLR broadcast newscasts about a building moratorium, chemical control of weeds, flight services and AIDS in April, May, June of 1987. (Brandt Exh. 3 at 13-14; Tr. 528.) Lynch also testified to his belief that all holiday safe-driving programs were aired on WYLR as well as on WWSC. (Tr. 528.)

40. There was no WYLR broadcasting of PSAs and there was never any WYLR nonentertainment programming that was carried over WWSC during the period July 1987 to December 1988. (Brandt Exh. 3 at 15-37; Tr. 528-30.) But Lynch testified that in general, WYLR carries during the work week four newscasts in the morning, one at noon, and three in the afternoon. These daily broadcasts included local as well as national news. (Tr. 539.) Lynch believes that the news programs were of two minute duration. (Brandt Exh. 3 at 42; Tr. 540.) The system utilized by Normandy was to write news copy for both stations and Lynch unequivocally testified that all major news stories were broadcast on both WWSC and WYLR. (Tr. 541-42.) Lynch affirmed that there was much programming on WYLR that was not reflected in the quarterly issues/programs documentation of Normandy. (Tr. 545-46.)

Lynch was examined on the apparent failure to spell out substantive discussions in the written records and Lynch replied:

> Simple inadvertence and misunderstanding of the basic rules. We made a mistake, and like I said, we're trying to reconstruct, through testimony and proffers [Exh. 6], what exactly we did over the license renewal period. Be assured, if I had to do this over again, it would be a more complete list.

(Tr. 546.) As an example of Normandy's incomplete methodology, Lynch conceded that records do not accurately reflect the fact of interviews of public officials on WYLR. But Lynch explained that almost all of WYLR's remote broadcasts from the site of an event involved the on-air interviewing of an official. (Tr. 546.) He cited a specific example of a volleyball tournament fundraising event for multiple sclerosis victims, wherein the problem of the disease was discussed and people from the community were asked for possible solutions. (Tr. 546-47.) The problem remained that the documentation which Brandt used to cross-examine did not reflect the full scope of WYLR's public service programming as it was testified to by Lynch.

41. There were miscellaneous additional public interest programs during 1989-90 that were testified to by Lynch: the Lake George Art Project (Tr. 531), the multiple sclerosis bike-a-thon (Tr. 531-32), a 4-H Writers Program and the Prospect School for Crippled Children (Tr. 535), the Lions Club (Tr. 537), Job Discovery (Tr. 553), and the Blood Mobile (Tr. 561). Lynch also identified the local Earth Day program which was aired between January and March, 1990. (Brandt Exh. 3 at 54.) It was broadcast with twelve minutes of comment on ecology in each of three hours. (Tr. 549-50.)

42. Lynch was also cross-examined on WYLR logs for programming on Friday, March 4, 1988 (Brandt Exh. 4) and on Sunday, June 24, 1990. (Brandt Exh. 5.) Brandt Exh. 4 reflected check marks made after programs. (Brandt Exh. 4 at 81.) The evidence shows that a person identified by Lynch as maintaining the logs, Ms. Cynthia Senecal, had made errors. (Tr. 577.) Her supervisor was Mr. Robert Barrett, Program Director of WYLR, and Dave Cobby, the Station Manager in charge of technical matters. (Tr. 577-78.) Ms. Senecal was employed by Normandy from early 1990 to early 1991. (Tr. 579.) Lynch was not checking the logs himself and he did not instruct Ms. Senecal on how they should be maintained. (Tr. 580.) Lynch did not give specific instructions to "line people." That was the responsibility of the AM or FM Program Manager or the Station Manager. (Tr. 581-82.) The emphasis, however, was on checking off commercials as they were aired so that billings could be sent expeditiously. Program announcements were not as meticulously checked, if they were checked at all. (Tr. 582.)

43. In meeting local news coverage, Lynch and Normandy represent that in 1990-91, a program entitled Tri-County Notebook was run live seven days each week announcing community events in time segments of thirty seconds. There were 120 logged programs per week which included announcements about local meetings, fund drives and art exhibits. (Normandy Exh. 6 at 15.) Lynch testified that he personally reviewed the logs in early 1992 (date outside the renewal period) and personally counted the exact amount of public service items. (Tr. 585-86.) But Lynch conceded again that the logs for the period 1990-1991 were inadequate. (Tr. 587.) Lynch contends that he reconstructed the WYLR PSA broadcasting during the renewal period by discussions with station personnel and references to testimonial letters, billings and orders for PSAs. (Tr. 594, 602-03.) The exhibit also contains an internal inconsistency by representing Tri-County Notebook as an entry that was separate from WYLR PSAs which are represented to have been 110 per week. (Normandy Exh. 6 at 15.)

44. Lynch concluded his account by referring to two other witnesses for Normandy who would establish that the bulk of WYLR PSAs in 1990-91 were not reported in the station logs and that corrective actions were taken to assure that current logs are accurate. (Tr. 593.) He admitted again that WYLR had a "major problem" in its paperwork during the license renewal period. (Tr. 596.) Station WYLR (FM) had a different policy on PSAs and actually ran fewer PSAs than Station WWSC(AM). (Tr. 600.) Ms. Trombley wrote PSA issues down for announcers to run on the AM station that were not also run on the FM station. (*Id.*) Many of the PSAs that were broadcast on the FM station were live which provided an opportunity for spontaneous civic announcements or encouragements for people to attend an event. (Tr. 610-11.) But most of the PSAs on the AM station were pre-recorded which could have facilitated a more comprehensive logging system. (Tr. 611.)

45. Lynch sought involvement of the FM station with the community through a less structured spontaneous format. (Tr. 612-13.) For example, according to Lynch, the FM station could muster 600 participants in a walk-a-thon through its live format. (Tr. 613.) Lynch testified that notwithstanding variances in the station logs during the renewal period, the number of PSAs broadcast over the FM station with its live format remained constant. In context, the FM programming offered broadcasting that was community oriented. The Tri-County Notebook was traditionally running 24 hours per day to announce local events. (Tr. 614-15.) A chemical free youth carnival was covered by WYLR in April 1990 from noon to 4:00 p.m. (Tr. 615.)

46. From 1987 to the present, WYLR has broadcast the Prospect School Radio Telethon in conjunction with the AM station in order to raise funds for handicapped children. (Tr. 616.) The Prospect School Telethon (Normandy Exh. 6 at 15) was conducted in the renewal period with four hour live programming through WYLR equipment set up in a satellite location in a shopping mall. The programming was intended to raise funds by personally speaking with persons who were shopping at the mall. These efforts of WYLR were supplemented by about 16 hours of related broadcasting on WWSC. (Tr. 616.) The process is illustrated by Lynch's testimony:

> That was 1987. The four hour live remote was 1987, and, since then, we've broadcast with PSAs leading up to the event, and, two, during the day of the event, we will broadcast the numbers that are in there for the phone-ins and will be following up to the total for the time of the telethon.

(Tr. 616-17.)

47. Lynch gave testimony concerning similar WYLR pro-

gramming during the renewal period[6] for the Angela Williams Benefit in 1988 (2 to 4 hours of live broadcasting to raise funds for a child in need of corrective surgery) (Tr. 617); the Chemical Free Youth Council of 1989 (35 minutes each week for four weeks and a four hour live program where children are asked to sign anti-substance pledges) (Tr. 619-20); Bobbin Reports from 1983 to the present (informs for 3 minutes 3 days each week on local offerings of entertainment) (Tr. 620-21); Easter Seals/Volleyball/Softball marathons from 1986 to the present (45 PSAs per week over 2 to 4 weeks to assist local area handicapped population) (Tr. 621-22); Fort Edwards Christmas Decorations in 1989 (depressed economic area assisted by 40 PSAs per week for 2 weeks and a four hour live program) (Tr. 623-24); Queensbury Recycling Committee in early 1990 (20 PSAs week plus live discussions over 4 hours on subject of recycling and instructions for recycling in local areas) (Tr. 625-26); Drug Free Graduation Party in June 1989 (36 PSAs per week and a one day 3 hour live program that illustrated and encouraged substance free youth parties) (Tr. 626); Giant Garage Sale (4 to 6 hours of daily broadcasting for 2 weeks to raise money for journalism scholarships) (Tr. 626-27); Lower Adirondack Regional Arts Council from 1975 to 1990 (2 PSAs for 2 weeks and one four hour live program to support and encourage local artists (Tr. 627-28); Americaid (12 PSAs per day for 4 weeks and 4 to 8 hours of live coverage to cover a local motorcycle convention and touring event) (Tr. 629-30); Operation Santa Claus from 1987 to 1990 (18 PSAs per week for 5 weeks and 4 to 6 hours of live coverage to provide toys for local needy children) (Tr. 631); Earth Day 1990 (45 PSAs per week plus a 3 hour live program to recognize and appreciate local ecology needs) (Tr. 632-33).

48. The evidence on programming in Normandy Exh. 6 and as testified to by Lynch was corroborated by the affidavits and testimony of two Normandy employees: Thomas J. Jacobsen (Normandy Exh. 9/7 and Tr. 650-698) and Richard C. Dusenbery (Normandy Exh. 9/4 and Tr. 700-713). Both were employed by Normandy since 1986 and worked on the AM and the FM broadcasts. Jacobsen is the current Program Director and Operations Manager. Dusenbery was Program Director during the period 1989-90.

Local Testimonials

49. Testimonials that were primarily in the form of letters from local persons were accepted in evidence, subject to a limitation of twenty five that related to the relevant period. (Normandy Exh. 11 at 1-27; Tr. 638-45.) This evidence reflects:

(a) Letter from Voluntary Action Center dated December 31, 1985, extending gratitude to WYLR for assisting in toy drive. (Exh. 11-1.)

(b) Letter from March of Dimes dated July 22, 1986, expressing gratitude for assistance with Walk America which raised $8,000. (Exh. 11-2.)

(c) Letter from local chapter of the Multiple Sclerosis Society ("MSC") dated September 17, 1986, thanking WYLR for assistance in raising $14,000. (Exh. 11-3.)

(d) Letter from MSC dated June 4, 1987, requesting WYLR to participate, through broadcasting, in a fundraiser as the "Official Voice" of MSC. (Exh. 11-4/5.)

(e) Unsigned tribute to WWSC from Congressman Gerald B.H. Solomon dated August 7, 1987, noting WWSC's "long tradition of charitable and civic involvement." (Exh. 11-6.)

(f) Letter from MSC dated September 3, 1987, expressing gratitude for broadcasting assistance in raising $15,845. (Exh. 11-7.) (g) Certificate of appreciation from Easter Seals 1988. (Exh. 11-8.)

(h) Letter from Warren County Veteran's Service Agency dated June 24, 1988, expressing thanks for broadcasting availability of motor van. (Exh. 11-9.)

(i) Letter from West Glens Falls Fire Co. No. 1 dated July 12, 1988, expressing thanks to WWSC for its advertising, sponsorship and financial support. (Exh. 11-10.)

(j) Letter from New York Easter Seal Society, Inc. dated November 15, 1988, thanking WYLR for supporting the disabled community. (Exh. 11-11.)

(k) Letter from New York Easter Seal Society, Inc. dated January 10, 1989, expressing gratitude to WYLR for assisting with a broadcast promotion in a volleyball project that raised $9,648. (Exh. 11-12.)

(l) Certificate of appreciation to WWSC, WYLR and Christopher P. Lynch from the Lake George Winter Carnival for 1989. (Exh. 11-13.)

(m) Letter from Adirondack Regional Chamber of Commerce dated May 16, 1989, expressing gratitude to Normandy and Lynch for assistance in Job Discovery '89. (Exh. 11-14.)

(n) Letter from Hadley-Luzerne Central School dated January 12, 1989, expressing thanks for assisting senior year students in attending WYLR's Non-Alcoholic Graduation Party. (Exh. 11-15.)

(o) Letter from Lower Adirondack Regional Arts Council dated November 20, 1989, expressing thanks to WYLR and Lynch for promotional broadcasting that assisted in attaining attendance of 4,000 persons at Winter Festival '89. (Exh. 11-16.)

(p) Letter from New York Easter Seal Society, Inc. dated January 29, 1990, expressing gratitude for the assistance of WYLR in raising $10,843. (Exh. 11-17.)

(q) Letter from American Red Cross Adirondack Chapter dated February 12, 1990, thanking WYLR for assistance in a blood drive. (Exh. 11-18.)

(r) Letter from Chapter Chairman of American Red Cross Adirondack Chapter dated February 12, 1990 expressing thanks to Lynch and WWSC. (Exh. 11-19.)

(s) Letter from Warren/Washington Counties Council on Alcoholism and Substance Abuse ("WWCC") dated April 2, 1990, to WYLR expressing thanks for a live remote broadcast of the Chemical Free Youth Carnival. (Exh. 11-20.)

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[6] The programming is described in Normandy Exh. 6 at 16-21. Lynch also testified to the ascertainment of the need for the programming. (Normandy Exh. 6 at 2-5.)

(t) Letter from the Earth Day Committee of the Community College dated April 24, 1990, expressing gratitude for live coverage of the Prospect Mountain Activity and for broadcast time spent on environment concerns. (Exh. 11-21.)

(u) Letter from March of Dimes dated May 10, 1990, expressing gratitude to WWSC/WYLR for assistance in the 1990 Walk America campaign which resulted in pledges from the Glens Falls community of $52,686. (Exh. 11-22.)

(v) Letter from WWCC dated May 14, 1990, expressing gratitude to WYLR and Lynch for support in its April activities which attracted 150 persons. (Exh. 11-23.)

(w) Letter from United Stated Senator Alfonse D'Amato dated August 28, 1990, to Lynch, WWSC/WYLR extending congratulations for the receipt of a broadcasting award from the NAB. (Exh. 11-24.)

(y) Flyer entitled Operation Santa Claus Workshop reflecting "6th Annual Y96 [WYLR] Holiday Hopechest" to benefit area children to be held on October 10, 1991. (Exh. 11-25.)

(z) Affidavit of the Honorable Frances X. O'Keefe, Mayor of Glens Falls, executed on July 14, 1992, stating his knowledge of Lynch for 17 years and Lynch's qualities for honesty and sound judgment and attesting to a social responsibility of Normandy's radio stations. (Exh. 11-26.)[7]

50. The testimonial letters identified above are generally supportive of Normandy's renewal expectancy.[8] However, only slight weight will be afforded to Exhibits 11-6, 11-10 and 11-19, because they relate to WWSC. Also, no weight will be afforded to Exhibit 11-24 which refers only to a broadcasting award as the basis for the testimonial. There will be no renewal testimonial credit awarded when there is no reference in the letter to WYLR's community ascertainment or its meeting some community need in connection with the award.

CONCLUSIONS OF LAW

Mitigation Of Skidelsky Findings

51. Application of the collateral estoppel doctrine requires the adoption here of the findings and conclusions against Normandy in the *Skidelsky* proceeding.[9] *RKO General, Inc .*, 94 F.C.C. 2d 890, 894 n.15 (Comm'n 1983). The judge in *Skidelsky* found Normandy to have misrepresented itself to the Commission in three ways in that proceeding. *See* Para. 3 above. Therefore, with those findings and conclusions as a given, if the inquiry should end here, Normandy would be disqualified on grounds of character. The Commission has stated a stringent policy for predictive adverse findings based on prior FCC violations:

> [W]ith regard to [the] larger class of FCC-related violations we find it appropriate and sufficient to treat any violation of any provision of the Act, or of our Rules or policies, as possibly predictive of future conduct and, thus, as possibly raising concerns over the licensee's future truthfulness and reliability, without further differentiation.

Character Qualifications In Broadcast Licensee, 102 F.C.C. 2d 1179, 1209-19 (Comm'n 1986). However, the Commission notes further that "not all violations are equally predictive." *Id.* at n.76. Therefore, the Commission further noted:

> [T]he nature of the violation, the circumstances surrounding it, and other pertinent considerations may attenuate or amplify its consideration of future reliability and truthfulness.

Id.

52. The ultimate inquiry under the Commission's policy is whether in light of the *Skidelsky* findings, Normandy, under the control of Lynch, can be trusted to be reliable and truthful and to conduct itself in compliance with the Commission's rules in its future dealings with the Commission in the operation of Station WYLR(FM) in Glens Falls, New York. *See Character Qualifications, supra* at 1209 (inquiry has historically been whether a licensee found guilty of FCC related misconduct will in the future be likely to be forthright in its dealings with the Commission and to operate its station in compliance with the Act and the rules).

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[7] This exhibit was received in evidence on September 1, 1992, subject to the stipulation that Mayor O'Keefe, if he were to appear, would testify on cross-examination that his knowledge of Lynch and Normandy's community involvement was gained through station WWSC and not station WYLR(FM). (Tr. 698-99.)

[8] Normandy also offered an Exhibit 11-27 which is a letter dated July 15, 1992, a date beyond the renewal period. Therefore, the letter will not be considered because it is irrelevant.

[9] When the *HDO* was issued in this case, Normandy's appeal on the Skidelsky issues had not yet been fully adjudicated. The Review Board had elected to review only the basic qualification issue on site availability. The Commission has recognized that collateral estoppel is triggered when some question or fact in dispute has been finally determined. *RKO General, Inc.*, 82 F.C.C. 2d 291 (Comm'n 1980). As long as Normandy had an appeal pending on the Skidelsky issues, the application of collateral estoppel remained in doubt because the *Skidelsky ID* findings were not yet final. However, on April 3, 1992, Normandy petitioned for the dismissal of its Queensbury application. Therefore, with no appeal pending, the Skidelsky issues are finally determined against Normandy through collateral estoppel. But *accord Georgia Public Telecommunications Commission, et al.*, 7 F.C.C. Rcd _____, Comm'n *Slip Op.* FCC 92-523, released December 9, 1992 at n.29 (collateral estoppel applies to presiding judge's ID only on issues actually litigated that were essential to the outcome).

53. In drawing conclusions about misrepresentation, the Commission will consider mitigating factors because the Commission has broad discretion in its choice of sanctions. *Id.* at 1210-11. But in cases of misrepresentation, the Commission "is not required to consider the station's past program performance." *Id.* at 1211 n.79. In the final analysis:

> [A]n applicant involved in serious misconduct might have its application granted if it could show the ability to operate in the public interest with no likelihood of future misconduct.

Id. at 1229. The outcome can only be determined "on the facts of a particular case." *Id.* The Commission has provided the following tests to apply in making predictive judgments based on past misconduct: (a) the willfulness of the conduct, (b) the frequency of such behavior, and (c) the currency *vel non* of the conduct. *Id.* at 1227.

54. The Review Board has acknowledged that "exculpatory" evidence would be relevant to Normandy's qualifications to continue operating WYLR(FM). *See* Para. 5, *supra*.[10] The Commission believes that a "licensee's record of compliance" provides "direct evidence of an applicant's future behavior" and that "direct evidence of an applicant's behavior outweighs predictive judgments based on extrinsic evidence of an applicant's character." *Character Qualifications, supra* at 1232. Therefore, since past conduct is the appropriate standard, all of the evidence that is in the record of Normandy's conduct, including its efforts to ascertain community needs as well as its failures to document issues/programs, will be considered. Based on the Commission's standard, the acts and omissions of Normandy take precedence over testimonials of character. But even if Normandy's programming were found to qualify for a renewal preference, good programming itself will not be considered as a factor in mitigation of a misrepresentation. *See KQED, Inc.*, 5 F.C.C. Rcd 1784, 1785 (Comm'n 1990), *recon. denied*, 6 F.C.C. Rcd 625 (Comm'n 1990).[11]

55. In support of a conclusion that Normandy had met the Skidelsky issue, the Bureau cites Normandy's evidence on service for a large number of community organizations, Lynch's participation in community activities, Lynch's honorable military service, and efforts to ensure and improve compliance with Commission rules and practices. The Bureau argues in proposed conclusions that the mitigating evidence is sufficient to meet the Skidelsky issue because that misconduct was an isolated incident, there is no indication of a misrepresentation in this proceeding, and there is no expectation that Normandy will later misrepresent itself to the Commission. The Bureau cites the Commission's holding that:

> Our principal concern is with misconduct disclosing a pervasive unwillingness or inability to meet the basic responsibilities of a licensee - - -. We have considered misconduct of a more limited nature a factor in not absolutely disqualifying - - - licensees.

WIOO, Inc., 95 F.C.C. 2d 974, 983 (Comm'n 1983).

56. Brandt reviews the findings and conclusions in the *Skidelsky I.D.* Brandt argues that Normandy has failed to meet its burden of proof and has limited its proof to broadcast program service which Brandt characterizes as "minimal." Brandt relies on the Commission's policy against misrepresentation, the requirement for candor in dealing with the Commission, and the ability to be truthful in future dealings with the Commission.

57. It is noted in mitigation that Lynch took Normandy into the *Skidelsky* comparative proceeding as a licensee that had no history of Commission violations. Normandy has now totally withdrawn itself from the appeal process of that case and will no longer be a possible licensee in Queensbury and Normandy has lost the right to compete for a new license. But Normandy chose to compete in Queensbury and must now live with the record it made in that proceeding. Normandy may also one day file for another frequency and therefore the motivation for Normandy to mislead the Commission could reoccur. Normandy also has expended considerable sums of money and amounts of time in responding to the adverse character findings against Normandy in this renewal proceeding. But those adverse economic factors are a result of Lynch's misconduct and do not mitigate the adverse character findings.

58. Lynch admits that he made mistakes in accumulating and assessing data about Normandy's programming. (*See* Para. 40, *supra*.) Because of a failure on the part of Lynch to establish a comprehensive regimen for recording WYLR's nonentertainment programming, Lynch rendered Normandy's credibility vulnerable to cross-examination. Lynch, Jacobsen and Dusenbery attempted to fill the lapses in Normandy's business records through their written and oral testimony. That was necessary testimony in order to complete the hearing record because the Commission's rules do not require logs to be maintained with respect to station programming. *See* 47 C.F.R. §73.1800 *et seq.* But Normandy was required to and did at times sporadically maintain an imperfect version of the required issues/programs lists as required by the Commission rules. *See* 47 C.F.R. §73.3526(9). In the totality of the documentary evidence, there were insufficient Normandy records to establish whether Lynch and the other two witnesses had an accurate recollection of WYLR's programming. Without an affirmative showing of a positive effort to correct an inadequate record system that was a significant factor in the adverse findings of *Skidelsky* with respect to Normandy's representations of its programming, there is no mitigating characteristic to the testimonial accounts of programming which were shown, under cross examination, to be based more on generalities and to be not accurate in all material respects. *See* Paras. 27, 31, *supra*.

59. The Bureau further argues in support of mitigation that there has been no evidence or "hint" in this proceeding of misrepresentation, lack of candor or any other misconduct. *See* Bureau's PFC at 10. But the fact is established by Lynch's own admission that he had altered the Borgos

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[10] The Review Board recognizes that the specific issue in this case is different from *Skidelsky*. After considering "the vicissitudes of Normandy's conduct in a forum where the issue truly has a decisional dimension," the Board asks for analysis of the "complex legal and policy issues inherent in that consequent issue." 7 F.C.C. Rcd at 1393.

[11] The Commission's policy is stated in the *Character Qualifications* proceeding that was held to set policy. There the Commission adopted a standard of discretion as not being required to consider a station's past program preference. *Character Qualifications*, 102 F.C.C. 2d at 1211 n.79. The *KQED* decision tightens the policy by excluding programming where there is "serious deliberate misconduct such as misrepresentation." *KQED, Inc.*, 5 F.C.C. Rcd at 1785.

affidavit (Exh. 3 at 11) to reflect WYLR when the affiant intended to reflect only WWSC. (*See* Para. 32, *supra.*) Also, there is no reference by the Bureau to the two additional misrepresentations found in *Skidelsky* with respect to the availability of an antenna site and the failure to disclose a contingent principle. *Skidelsky* at 2228, 2230. Lynch was found to have failed to produce witnesses who would have corroborated Lynch's testimony concerning conversations with a site owner. Such third-party testimony was found to be necessary because the site owner had denied in a declaration ever speaking with Lynch. Yet Lynch based his defense on his recollection of such a conversation with the owner. Lynch also failed to produce a witness from a real estate firm with whom he claimed to have had conversations about the site. A similar failure on the part of Lynch to produce relevant witness testimony has occurred in this case. The testimony of Mrs. Jackie Ingraham would have shown the system that Lynch contends was implemented at WYLR to accurately record programming data. *See* Para. 31, *supra.* There has been no evidence introduced by Normandy in this case which counters the conclusion in *Skidelsky* that there is a substantial likelihood that Normandy will not make a trustworthy licensee. While Normandy is not required to log its programming, Normandy is required to maintain true and accurate issues/programs lists. In light of the misrepresentations of programming found in *Skidelsky*, evidence of mitigation that would show that Lynch has installed a system of maintaining true and accurate records and that would demonstrate a recognition on Lynch's part of the need for candor in representing programming claims to the Commission would be the most weighty mitigation. Normandy has failed to present such mitigation evidence.

60. It was further found in *Skidelsky* that Lynch has a secured arrangement for a ten year loan that involves the pledge and escrow of all Normandy stock. The terms of the loan provide that the creditor would receive all of Normandy's stock if Lynch fails to pay the debt. An order issued by the judge in *Skidelsky* required disclosure of such an arrangement. Yet Lynch failed to produce the loan agreement. The judge found that Lynch's failure to report the contingent ownership would not alone disqualify Normandy from receiving a grant in that proceeding. Rather, it was the representation made in that proceeding by Lynch that he mistakenly believed that he did not need to disclose the contingent ownership because he did not believe that the contingency ever would occur which was the wrongdoing. There is no evidence of a similar misrepresentation in this case. But there is a parallel incident in this case of Lynch attempting to submit the altered Borgos affidavit which shows a continuing disposition on the part of Lynch to alter the truth. Also, the mere absence of a wrongful act of misrepresentation in this case would not be a proper standard of mitigation because it would reward a previously errant licensee simply for later adhering to the law as one is required to do anyway.

61. Normandy has introduced evidence which establishes that in February 1990, a date prior to the release of the adverse *Skidelsky* findings, Lynch had attended a NAB sponsored course on the Commission's renewal process. (Para. 31, *supra;* Normandy, Exh. 8.) Thus, Normandy cannot contend that Lynch attended the conference to correct the rulings disclosed in *Skidelsky*. The evidence further reflects a representation by Normandy that Lynch gave to his receptionist, Mrs. Jackie Ingraham, a page from the NAB primer regarding public files and Lynch requested her "to check all items and her yes notations signifying in her judgment all files are correct." (Normandy Exh. 8.) But Mrs. Ingraham was never produced as a witness to explain the system. It cannot be determined that based upon Lynch's attendance at the NAB conference Normandy's public file record keeping is maintained in a manner that would show that Normandy's misrepresentations in *Skidelsky* would not be repeated.[12]

62. Normandy and the Bureau also rely on efforts made by Lynch to determine community needs as relevant evidence for mitigation. Employees of Normandy interviewed community leaders and representatives of fifty local organizations. (Normandy Exh. 6 at 2-3.) For purposes of news coverage, Normandy contacted twenty nine identified local agencies. (*Id.* at 5-6.) Such evidence relates to the ascertainment of programming needs and it has been established as the rule of this case that evidence of programming is not accepted in mitigation of misrepresentation. *KQED, Inc., supra.*[13] However, the ascertainment evidence does demonstrate that Normandy was seeking to cooperate with local groups to get out their PSAs and such evidence does mitigate, to a degree, the adverse findings in *Skidelsky*. But it does not meet the adverse inference of future conduct raised by the *Skidelsky* findings.

63. Lynch served honorably in the armed forces for three years and he received an honorable discharge before he began his broadcasting career at Normandy. His military service shows an ability to accept responsibility. Normandy also introduced evidence showing that Lynch has a good reputation in the community for completing commitments made on behalf of WLYR for fund raising broadcasting. (*See* Normandy Exh. 11.) Such evidence in its totality does not support a conclusion that Lynch's conduct in the *Skidelsky* comparative proceeding might not be repeated. The Bureau argues in its PFC that it was a series of

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[12] It is noted that a handout at the NAB conference did address the public inspection file and the quarterly issues/programs lists in that file. (Normandy Exh. 8.) Yet there is no conclusion reached that Lynch has succeeded in installing a record system that might be considered representative of industry standards. Lynch seems satisfied to delegate general instructions to subordinates without himself personally monitoring compliance. Lynch is the owner of Normandy who must assess the company's priorities. But there was considerable time spent in discovery and in cross-examination that could have been considerably shortened by having in place a high caliber record keeping procedure.

[13] As noted above, the Commission's policy was initially stated as not requiring consideration of the station's past program performance where there has been a misrepresentation. *Character Qualifications* at 1211 n.79. That standard would permit consideration of programming as a matter of discretion. But in a subsequent adjudication, the Commission eliminated the discretionary direction about programming evidence and held that such evidence of meritorious programming must be excluded to mitigate a misrepresentation. *KQED, Inc., supra* at 1785. *See Homemakers North Shore, Inc.*, v. *Bowen*, 832 F.2d 408, 412-13 (7th Cir. 1987) (a change in interpretation may be announced in an administrative adjudication). Since meritorious programming is derived through ascertainment, the evidence of ascertainment of programming needs is also irrelevant to mitigate a misrepresentation. However, Normandy's efforts to ascertain community need will be considered a factor in mitigation without reference to the substantive merits of the ascertainment.

"exaggerated claims" that formed the basis of the judge's conclusions in the *Skidelsky ID*. That conclusion would be contrary to the principle of collateral estoppel as applied in the *Skidelsky Recon*. That conclusion also is not supported by the facts and conclusions. *See Skidelsky ID* at 2229-30, 2232 (Normandy has not established that it can be relied on to provide truthful information to the Commission). The judge in *Skidelsky* found three counts of misrepresentation on the part of Normandy and those findings will not be qualified here. General opinion evidence will not offset findings and conclusions regarding three distinct misrepresentations.

64. The Bureau and Normandy also rely on the case of *United Broadcasting Co.*, 49 Radio Reg. 2d (P & F) 5897, 602 (Comm'n 1981) which held that the loss of one license does not preclude the grant of another license. But here it is not the fact of denying Normandy's application in *Skidelsky* that warrants a denial of renewal in Glens Falls. Rather, the findings and conclusions in *Skidelsky* establish misrepresentations which under principles of collateral estoppel as applied by the Review Board to this case cannot be litigated here. The failure of the burden of proof on the part of Normandy to mitigate those misrepresentations is the proximate cause for a denial of renewal here. Thus, the denial of a construction permit for a new FM facility in *Skidelsky* is irrelevant to whether or not Normandy has shown through mitigation evidence that it will be trustworthy in its dealings with the Commission.

Renewal Expectancy

65. The Commission has recently prescribed a narrow standard for the application of collateral estoppel to initial decisions of administrative law judges. *See Georgia Public Telecommunications Commission, supra, Slip Op.* FCC 92-523 at n.29 (collateral estoppel applies only to litigated issues that were essential to outcome). Since Normandy was disqualified by the Review Board solely for lack of reasonable assurance of an antenna site, the litigation of the three misrepresentations may not have been necessary for the *Skidelsky* outcome. However, that is a separate question of law for the Review Board to address on appeal. For purpose of adjudication at the hearing level, the application of collateral estoppel as prescribed for this case by the Review Board in the *Skidelsky Recon.* continues to be the law of this case. However, the Presiding Judge will adjudicate the comparative phase of this case in the event the above conclusion with respect to Normandy's license disqualification is reversed on the merits, or for failure to meet the Commission's recently stated policy on collateral estoppel.

66. In addition to the standard comparative criteria,[14] a renewal expectancy may be awarded to an incumbent licensee if it is warranted following a review of the incumbent's past program performance during the renewal period. It has been held:

> [Commission] policy, as we understand it, is simply this: renewal expectancy is to be a factor weighed with all the other factors, and the better the past record, the greater the renewal expectancy "weight."

Central Florida Enterprises v. *F.C.C.*, 683 F.2d 503, 506 (D.C. Cir. 1982). A renewal expectancy is warranted if the incumbent is shown to have met the needs and interests of the listeners in the community of license or service area. Where an incumbent shows past broadcasting that pays unusually high attention to community needs and interests, the past record will be considered "superior" which adds a greater weight to the renewal expectancy. *Formulation of Policies and Rules to Broadcast Renewal Applicant ("Renewal Policy II")*, 3 F.C.C. Rcd 5179, 5185 (Comm'n 1988).[15] When an incumbent renders "substantial" but not superior service the expectancy becomes a comparative preference weighed against the other comparative factors. *Cowles Broadcasting II*, 86 F.C.C. 2d 993, 1012 (Comm'n 1981). But if the level of performance is found to be "minimal," there is no comparative credit for past broadcasting afforded to the incumbent. *Renewal Policy II, supra* at 5185.

67. Normandy represents that it conducts periodic community ascertainment by interviewing community leaders and members of the general public. Normandy's claim for renewal expectancy relies on news, sports, weather and PSAs. WYLR's predominantly music format permitted such broadcasting to be conducted only through short announcements and spot broadcasts. WYLR(FM) was a music intensive radio station that was not presenting discussion format public affairs programming.

68. Claims for credit for specific programming claimed by Normandy are difficult to assess because of apparent exaggerated claims for the Tri-County Notebook, because of questions raised by the dirth of useable information in Normandy's records, and because the announcers were instructed to be precise in checking off only the commercial advertisements. There was no documentation of nonentertainment programming in 1984-1985, and programming thereafter was in large part estimated by Lynch and Normandy employees through undocumented seat-of-the-pants backward projections from 1992 records. (*See* Paras. 43-44, *supra.*)

69. There was testimony from Lynch and two Normandy employees, Messrs. Dusenbery and Jacobsen, on the substance of Normandy's non-entertainment programming. But much of the testimony was general, unfocused and inconsistent with a finding of substantial programming:

> Because of WYLR's format and listenership, most public service and community affairs issues were covered through short announcements and live broadcasts. This was deemed the most effective way to get the message to our listeners.

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[14] *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (Comm'n 1965). But the Commission gives only a secondary status in comparative renewal proceedings to the structural factors of diversity and integration. *See Cowles Broadcasting, Inc.*, 86 F.C.C. 2d 993, 1015 (Comm'n 1981).

[15] Beginning in 1982, the Commission has been conducting a comprehensive inquiry into proposals for comparative renewal hearings. *See First Report and Order*, FCC 89-108 (released May 16, 1989) ("Renewal Policy I"); Renewal Policy II, *supra;* and *Third Further Notice of Inquiry and Notice of Proposed Rule Making*, 4 F.C.C. Rcd 6363 (Comm'n 1989) ("Renewal Policy III").

(Affidavit of Dusenbery, Normandy Exh. 9 at 4-5.) In other words, a deliberate policy choice was made to not present a regular program on community needs such as regular scheduled interviews and discussions on local issues with local civic leaders, police and fire chiefs, etc. On cross-examination, Dusenbery testified:

> A. WYLR's format - - - [was] serviced through short wide reads, as opposed to 60 second pre-recorded announcements, so we could adlib our way through it.
>
> Q. But you don't do any regular scheduled public affairs programs [16] on WYLR. Is that correct?
>
> A. WYLR was, at the time, was a music intensive radio station, so, no, we would not - - - we would not format a talk public affairs program.

(Tr. 704-05.) Dusenbery further testified:

> Q. [D]id you hear any public affairs on WYLR during your tenure as Program Director?
>
> A. I did not hear public affairs programs, - - -.

(Tr. 710.) Lynch then questioned Dusenbery on redirect:

> Q. Can you give me examples of the public affairs you just referred to, the type of public affairs that you heard over your radio station under your tenure over the period of 1989-1990
>
> A. We - - the public affairs that we broadcasted and covered were campaigns. I would not classify them as public affairs programs. We had specific campaigns for a number of different issues.

(Tr. 711.) Lynch had also admitted in the *Skidelsky* hearing that the public service announcements aired by WYLR were "minimal." (Brandt's PFC at 10.)[17]

70. The judge in *Skidelsky* concluded that it was doubtful that Normandy carried any public affairs programming on WYLR. *Skidelsky ID* at 2232 n.3. In *Skidelsky*, Lynch explained, as he has in this case, that FM noncommercial programming was not kept track of by logging as was done at the AM station. *Id.* And in this case, Dusenbery admitted that WYLR's format was geared toward a younger group, a format which is consistent with Normandy's format in *Skidelsky* where it was found that the younger FM audience was not as receptive to nonentertainment programming as was the AM audience. This evidence further supports the conclusion that WYLR has never presented a *bona fide* nonentertainment programming format that could qualify for a substantial renewal preference.

71. Review of a licensee's record must also take account of compliance with Commission rules. *See Metroplex Communications, Inc.*, 4 F.C.C. Rcd 8149, 8153 (Review Bd 1989), *aff'd* 5 F.C.C. Rcd 5610 (Comm'n 1990). While program logs are no longer required, the Commission's rules with respect to public inspection files do require the creation and maintenance of quarterly data on nonentertainment programming. The rule specifically provides:

> For commercial AM and FM broadcast stations, every three months a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period [shall be maintained for public inspection].
>
> * * *
>
> The list shall include a brief narrative describing what issues were given sufficient treatment and the programming that provided this treatment. The description of the programs shall include, but is not limited to, the time, date, duration and title of each program in which the issue was treated.

See 47 C.F.R. §73.3526(9) (local public inspection files of commercial AM and FM stations). These lists are referred to as "issues/programs lists." Normandy has failed to comply with the rule.

72. Station WYLR(FM) was in non-compliance with the rule throughout much of the renewal period. (*See* Paras. 25 to 44, *supra.*) The arrogance of non-compliance is most graphically illustrated by the total absence of reporting in 1984 and 1985 when there were absolutely no FM programs listed on WYLR's issues programs lists. (Brandt Exh. 3.) The lists for 1986 and 1987 also contain no programming for the FM station. Lynch testified that there were newscasts listed for the AM station that were also broadcast over the FM station. (Tr. 527-28.) The hearing was protracted by cross-examination as a result of Normandy's failure to maintain the lists. Brandt was allowed to cross-examine Lynch fairly extensively because there were no records available through discovery to establish with any precision the nonentertainment programming of WYLR during the renewal period.

73. Based on the experience the Commission has had with Normandy's issues/programs lists both in *Skidelsky* and in this case, it is likely that Normandy and Lynch will continue to be less than candid with the Commission with respect to Station WYLR(FM) in the future. That conclusion is reached as a result of the repeated instances in both cases where Normandy could not produce the required records and, more importantly, the failure on the part of Normandy to produce a witness to testify that a system was put in place before or shortly after the release of the *Skidelsky ID* which would assure compliance by WYLR with the Commission's rule requiring the maintenance of issues/programs lists. There is absolutely no assurance in the record that Normandy and Lynch have adequately

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[16] A definition of public affairs programming acceptable to the witness was stated by Brandt's counsel as follows: "A public affairs program is a specific, program allotted a specific time or number of minutes in a week or a month or whatever, devoted specifically to one issue or a public affairs forum." (Tr. 704).

[17] In his PFC, Brandt quotes Lynch and cites to the *Skidelsky* transcript. Lynch did not deny or qualify the quote in Normandy's reply pleading which was subsequently filed. Therefore, Brandt's unchallenged representation of the *Skidelsky* transcript is accepted as well as the admission against interest by Lynch.

trained and instructed an employee who will meet WYLR's public file reporting duties with regard to nonentertainment programming.

Normandy's Failures Defeat A Proposed Policy

74. The importance of maintaining complete and current issues/programs lists is illustrated by a policy proposed by the Commission that an "incumbent be granted a *rebuttable* presumption that it has provided meritorious service sufficient to warrant a renewal expectancy credit upon presenting [issues/programs lists] at the comparative hearing." *Renewal Policy II, supra,* 4 F.C.C. Rcd at 6365. The Commission proposes presumptive evidence because the Commission recognizes the reliability of such mandated lists:

> The "issues/programs" list is a significant and representative indication that a licensee is providing substantial service to meet the needs and interests of its community, and thus may be entitled to a renewal expectancy.

Id. The Commission has been studying ways to improve the comparative renewal process. Under the *Renewal Policy II* approach, in the aspect of evidentiary proof, the Commission expects to expedite the hearing by a presumption of a renewal preference based on the lists with which Commission broadcast licensees must comply. By wilfully failing to establish reliable issues/programs lists, Normandy, Lynch and WYLR would not be able to comply with the policy. Granting Normandy a renewal expectancy for "substantial" programming when Normandy had failed to maintain the underlying documents could set a deleterious example for the rest of the industry. The need for deterrence, acknowledged by the Bureau, must go beyond the incumbent licensee to the industry as well. *See WIOO, supra,* 95 F.C.C. 2d at 984 (lost opportunity due to violation was significant deterrent to repetition by incumbent "and others").[18]

Normandy's Failure To Prove A Substantial Format

75. Normandy missed its opportunity for more than a "minimal" presumption from its issues/programs lists for Station WYLR(FM). In fact, WYLR's license is in jeopardy because of Normandy's failure to compile the lists. For his part, Brandt has shown that WYLR did not broadcast nonentertainment programs (as distinguished from newscasts and PSAs), that the lists do not reflect that issues important to the community were sought out, developed and responded to in program broadcasting formats, and that for two or more years there was a failure to compile required lists for WYLR . Therefore, the Commission's policy as presently formulated requires the conclusion that Normandy has failed to meet its burden of proof with respect to a renewal expectancy. *Cf. WWOR-TV, Inc.,* 5 F.C.C. Rcd 2845, 2846 (Comm'n 1990) (Comm'n 1990) (Comm'n expects decision-making personnel to be aware of changing Commission policy and, where appropriate, to apply such change in pending cases).[19]

76. Evidence that the Bureau urges as sufficient to warrant a substantial renewal expectancy also is weighed and considered by the Presiding Judge under the established standards for renewal expectancy. The Commission has defined "substantial" as programming that is "sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal." *Cowles Broadcasting I,* 62 F.C.C. 2d 953, 955 (Comm'n 1977). The Bureau has marshalled evidence which does not meet that definition of "substantial" because the format of WYLR remains essentially music directed towards young persons. That constriction of the programming limits considerably the universe of the ascertained community needs of WYLR's audience. And the format admittedly excludes nonentertainment programming that is "substantially above" newscasting, weather forecasting, fund raisers and PSAs.

77. The Bureau represents that over the license term, WYLR broadcasts on a weekly basis about 55 local newscasts of 3 minutes duration and about 70 national newscasts of between 1 to 2 minutes. Between 6 and 7 newscasts would be made during morning and evening drive times. WYLR also broadcast 20 weather forecasts of about 30 seconds duration each week. Also, on a weekly basis, WYLR ran approximately 100 PSAs of about 30 seconds duration, about half of which were for local organizations. (Normandy Exh. 6 at 6-8, 14-15.) And in the course of presenting such public service broadcasting, WYLR ran from time to time certain remote live programming designed to raise funds for local chapters of recognized charitable organizations such as Multiple Sclerosis, Easter Seals, March of Dimes, Lions. (*See* Paras. 36-37, *supra.*) The community interests for such broadcasting were determined by Normandy staffers who spoke with approximately 80 organizations and individuals. (Paras. 20, 62, *supra.*) The percentage of WYLR's broadcast time that was devoted to this non-entertainment broadcasting cannot be deter-

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[18] *Renewal Policy II* also proposes that once the presumption is triggered, the opposing applicant may present evidence in rebuttal. Specifically, the policy states:

> For example, a presumption based on compliance with the issues/programs list requirement, as proposed above, could be rebutted by demonstrating that: (1) the licensee did not broadcast programs listed on its issues/programs list; or (2) the programs listed were not responsive to issues of concern to the licensee's audience and the licensee's judgments in this regard were not reasonably made.

Renewal Policy II, supra at 6365. Evidence offered by Brandt's Exhs. 3, 4 and 5 would rebut any presumption of "substantial" programming if Normandy was found to merit a presumption.

[19] The prospective policy proposed by the Commission under *Renewal Policy II* is applied here for two reasons: First, to show that Normandy's persistent failure to compile adequate issues/programs lists would frustrate the proposed policy and would set the wrong example for the industry in light of a prospective adoption of such a policy. Second, to illustrate how even under a proposed policy change that is intended to simplify proof of renewal programming for the benefit of incumbent licensees, Normandy would not benefit from the proposed presumption in its favor and would frustrate the regulatory efficiency that is intended to be gained. Since renewal is decided on prospective evidence, it is appropriate here to make the analysis.

mined with any reasonable precision, and therefore it cannot be found to be "substantial" under the *Cowles I* definition. *Cf. Simon Geller*, 90 F.C.C. 2d 250 (Comm'n 1982), *recon. denied*, 91 F.C.C. 2d 1253 (Comm'n 1982) (no renewal expectancy awarded where less than 1% of incumbent's broadcasting was nonentertainment). While it cannot be determined based on the data submitted by Normandy whether the above broadcasting accounts for less than 1% of the universe of WYLR broadcasting for a measured period of time, nor can the calculation of 6% advanced by Normandy be ascertained from the hearing record. (Para. 35, *supra.*) Thus, as an additional ground for denying Normandy a substantial renewal preference, the evidence relied on by Normandy is not sufficiently reliable to support any such finding. *See* APA Section 7(c) which requires a record supported by "reliable, probative and substantial" evidence. [5 U.S.C. Section 556(d)].

78. The conclusion is reached that Normandy has not met its burden of proof even after considering the testimonial letters compiled by WYLR in Normandy Exh. 11 and the testimonials also received in evidence as part of Normandy Exh. 9 and part of Normandy Exh. 3. The Commission has held that there are three elements in determining the weight to be accorded to any renewal expectancy: (a) the amount of nonentertainment programming presented, the time of day it is presented and whether it is directed to local needs and interests; (b) the amount of locally produced programming; and (c) the reputation of the station in the community. *Radio Station WABZ, Inc.*, 90 F.C.C. 2d 818, 840-42 (Comm'n 1982), *aff'd sub nom. Victor Broadcasting* v. *F.C.C.*, 722 F.2d 756 (D.C. Cir. 1983). As concluded above, Normandy has failed to introduce reliable and substantial evidence of WYLR(FM) programming that was not related to WWSC(AM) programming and which met an identified community programming need or interest. The bulk of the evidence presented by Normandy that related specifically to WYLR was in the form of narrative testimonial accounts and which focused primarily on newscasts, weather reports, weather warnings, and fund raisers or narrow onetime community events such as anti-substance abuse projects. For example, there was no evidence of nonentertainment talk programming such as that illustrated in another case as follows:

> The station [WABZ-FM] set aside 12:30 p.m. each day, for public affairs programs. At that time, the station presented an interview, often live, with a local official. [Footnote omitted.] These five minute segments dealt with issues of particular concern to the community. [Footnote omitted.]

Radio Station WABZ, Inc., 90 F.C.C. 2d at 840. Rather, in stark contrast to that example of "substantial" programming, WYLR's format was described as music intensive directed to a young audience and which purposefully did not include "talk public affairs programs." (Tr. 705.)

79. The testimonials from members of the community are important and have been fully considered by the Presiding Judge. (*See* Paras. 49-50, *supra.*) But the Review Board has noted that while public witnesses can enhance an otherwise creditable programming record, it cannot serve as a basis for a renewal expectancy in the absence of a programming record. *Metroplex Communications, Inc.*, 4 F.C.C. Rcd at 8153. Therefore, the testimonials are not sufficient evidence to award Normandy a renewal expectancy.

Comparative Analysis

80. Because Normandy has failed to prove meritorious nonentertainment programming that qualifies for a superior or a substantial renewal expectancy preference, only a minimal renewal preference is awarded. The legal implications of that conclusion are as follows:

> Where - - - the incumbent rendered substantial but not superior service, the "expectancy" takes the form of a comparative preference weighed against [the] other factors - - -. An incumbent performing in a superior manner would receive an even stronger preference. An incumbent rendering minimal service would receive no credit.

Central Florida Enterprises II, 683 F.2d at 506, citing with approval *Cowles II*, 86 F.C.C. 2d at 1012. Thus, Normandy and Brandt are now to be compared as equals under the comparative criteria.

81. Normandy receives 100% credit for integration and a substantial qualitative credit for Lynch's long-term residency in the service area. There was evidence offered of Lynch's significant civic activities and therefore a significant qualitative credit will be awarded for his local residency. *See Ronald Sorensen*, 6 F.C.C. Rcd 1952 (Comm'n 1991) (local residence must be considered in conjunction with civic activities). Normandy will also receive a slight qualitative credit for Lynch's broadcasting experience. *Policy Statement*, 1 F.C.C. 2d at 396 (previous broadcast experience is of "minor significance"). Since Brandt does not intend to integrate himself into management he receives no integration credit. Nor would he receive a credit for qualitative factors since he does not intend to integrate into management. Both Normandy and Brandt propose to install auxiliary power systems and therefore both are evenly assessed under that criteria.

82. Normandy owns WWSC(AM) in addition to WYLR(FM) and both stations are broadcasting in the same community of license. Normandy has made no commitment to divest WWSC if it is awarded a renewal of WYLR and Lynch intends to continue to operate both stations. (Tr. 237.) Brandt has five MMDS systems in areas that are outside of the Glens Falls service area. Three of those systems are out of state.

83. Normandy will receive a substantial demerit under the diversification criteria which the Commission considers a factor of primary significance as a comparative criteria. *See* comparative *Policy Statement*, 1 F.C.C.2d at 394 and *Renewal Policy II*, 3 F.C.C. Rcd at 5188. Brandt's five MMDS properties will have no impact on Brandt's comparative diversification position. *Id.*[20]

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[20] *See generally Morris, Pierce & Pierce*, 88 F.C.C. 2d 713, 724 (Review Bd 1981) (no diversification demerit assessed where program production interests are not significant in the subject locale), *review denied*, FCC 83-31, released January 25, 1983. *See also Mark L. Wodlinger*, 3 F.C.C. Rcd 3139, 3142 (Review Bd 1988) (no significant diversification demerit for LPTV services outside the service area).

84. The ultimate question for determination is the weight to be accorded a diversification demerit against Normandy as an incumbent in a comparative renewal case. While diversification has been an outcome-determinative criteria in comparative hearings for new facilities, where the incumbent proves that it performed well during the renewal period the Commission's policy has been to ascribe a secondary importance to diversification in comparative renewal proceedings. *Renewal Policy II*, 3 F.C.C. Rcd at 5188-89. *See also F.C.C.* v. *NCCB*, 436 U.S. 775, 803-09 (1978) (where challenger has greater diversification the incumbent with a meritorious record will prevail) and *Cowles II*, 86 F.C.C. 2d at 1015, *aff'd, Central Florida Enterprises II*, 683 F.2d at 506-07. But the policy considerations for ascribing a lesser importance to diversification in renewal cases[21] evaporates where the incumbent fails to show a substantial superior performance in the renewal period. *Id. Cf. Simon Geller II*, 59 Radio Reg. 2d (P&F) 979 (Comm'n 1985) (incumbent which had lost renewal preference ultimately succeeded against challenger under comparative criteria of diversification and integration).

85. Because Normandy has failed to prove entitlement to a renewal expectancy preference, an analysis under the standard comparative criteria requires an award to Brandt because of Normandy's substantial diversification demerit.[22] It is noted that under prevailing case law the Commission will weigh all at once a prior violation (e.g. studio move) along with evidence relating to renewal expectancy and the comparative criteria. *See Central Florida II*, 683 F.2d at 506-07 n.16, *affirming Cowles II*, h86 F.C.C. 2d at 1015-18. Later, the Commission abandoned character violations as a comparative criteria and applied the policy against the comparative use of character to comparative renewal proceedings as well. *Character Qualifications*, 102 F.C.C. 2d at 1229-32. In this *Initial Decision*, the Presiding Judge has concluded separately (1) that Normandy has failed to exculpate or mitigate the three adverse character findings in the *Skidelsky ID;* (2) that even if that conclusion regarding *Skidelsky* is not approved on appeal, Normandy is not entitled to a renewal expectancy based solely on the evidence of its nonentertainment broadcast record and without consideration of the adverse *Skidelsky* findings;[23] and (3) the award to Brandt under the comparative criteria does not include any demerit against Normandy for the adverse findings of *Skidelsky*.

Summary Conclusions

86. Normandy is found to be unqualified as a Commission licensee and not entitled to a license renewal for Station WYLR(FM), Glens Falls, New York, because Normandy has failed to prove exculpation or mitigation from adverse character violations found against it in *Barry Skidelsky*, 6 F.C.C. Rcd 2221 (Admin. L.J. 1991) and that therefore Normandy is disqualified to own and/or operate WYLR(FM)[24] because Normandy has not established that it can be relied upon to hereafter provide truthful and candid information to the Commission.

87. Alternatively, Normandy has failed to prove that it is entitled to a renewal expectancy preference because the evidence offered by Normandy fails to show that the incumbent complied with the Commission's rule requiring quarterly programming lists and in conjunction with that violation of a Commission rule there was insufficient reliable evidence to establish superior or substantial nonentertainment programming for Station WYLR (FM) during the renewal period June 1, 1984 to April 30, 1991. Specifically, the evidence of record shows that WYLR(FM) offered a predominantly music format for a younger audience which did not include any substantive programming to cover local issues. Nonentertainment programming was limited to newscasts, weathercasts, announcements and spot fund raisers for local charitable organizations which is evidence found in its entirety to constitute minimal nonentertainment broadcasting. When compared with Brandt, Normandy, without benefit of a renewal preference, loses because of its substantial diversification demerit.

ORDER

Accordingly, IT IS ORDERED that the license renewal application of Normandy Broadcasting Corp. (File No. BRH-910129UR) for Station WYLR(FM) (95.9 MHz), Glens Falls, New York, IS DENIED.

IT IS FURTHER ORDERED that the application of Lawrence N. Brandt (File No. BPH-910430MB) for a Construction Permit for a new FM Station on 95.9 MHz at Glens Falls, New York, IS GRANTED.[25]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

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[21] The Commission holds that a challenger can unfairly structure its application to take advantage of an incumbent's diversification weakness and that an unqualified application of the diversification criteria to incumbents might lead to a haphazard restructuring of the broadcast industry. *Renewal Policy II*, 3 F.C.C. Rcd at 5188-89.

[22] Although not relevant to the legal criteria of this Initial Decision it is noted that Normandy will retain its AM broadcast facility in Glens Falls which is the station that had the more favorable issues/programs lists. (*See* Para. 13, *supra.*),

[23] While there was no substantive issue set against Normandy in the *HDO* for violations of the Commission's rule requiring issues/programs lists [47 C.F.R. §73.3526(a)(9)], failure to comply with that rule was another evidentiary factor supporting the conclusion here that Normandy does not merit a renewal expectancy.

[24] There was no revocation proceeding commenced against Normandy's AM station for the Skidelsky violations and therefore Normandy's ownership of the AM station is not at risk in this proceeding. *Cf. United Broadcasting Co.*, 49 Radio Reg. 2d (P&F) 597, 602 (Comm'n 1981) (loss of one license does not require the denial of ownership of another licensee).

[25] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-326

In the Matter of

Amendment of Section 73.202(b), RM-7179
Table of Allotments,
FM Broadcast Stations.
(Brunswick and Waycross, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 30, 1992; Released: December 28, 1992

By the Chief, Allocations Branch:

1. At the request of Rowland Radio, Inc. ("Rowland"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 4014 (1990), proposing the reallotment of Channel 273C1 from Waycross to Brunswick, Georgia, and the modification of Station WBGA(FM)'s license to specify Brunswick, Georgia, as its community of license. Rowland and Brunswick Broadcasting Corporation ("BBC") licensee of Station WGIG(AM), Brunswick, Georgia, filed comments and reply comments.

2. The *Notice* requested that Rowland provide additional information as to whether its proposal would result in a preferential arrangement of allotments. Rowland was asked to submit information concerning the other public interest factors normally considered under our allotment priorities where no first or second aural or first local service is at issue, such as location, city size, and the availability of reception services. In response, Rowland submits that Brunswick is more in need of additional radio service than Waycross. First, it claims that transportation attributes of Brunswick require that it be served by a diverse number of radio services. Rowland notes that Brunswick is served by an interstate and several other highways, three airports and a major deepwater seaport. In contrast, Waycross is an inland community served by several highways and an airport. Rowland contends that the numerous users of Brunswick's interstate transportation facilities require a vast amount of information regarding news, weather, community service and activities.

3. Second, Rowland claims that Brunswick and its environs are a major tourist attraction. It notes that Brunswick provides access to beaches, a number of parks, golf courses, recreational facilities, fishing, historic sites and museums.

4. Third, Rowland argues that Brunswick, the governmental seat of Glynn County, is a growth area while Waycross has seen a decrease in its total population since the 1980 U.S. Census. Rowland submits an analysis of population trends for the communities of Waycross and Brunswick. This analysis indicates that between 1980 and 1986, Waycross' population decreased by 2.6% while Brunswick's population increased by 2.5%. Rowland also argues that Brunswick's population is more ethnically diverse than that of Waycross and therefore has a greater need for additional radio services.

5. Finally, Rowland points out that since there is no change in transmitter site, no area of reception service will change as a result of a grant of its proposal. Rowland submits that both Brunswick and Waycross are and will continue to be served by five or more full time aural facilities.

6. In opposition, BBC notes that Rowland proposes no reception service improvements. BBC states that there are six aural transmission facilities licensed to Waycross: three commercial FM facilities (Stations WBGA, WHFX, and WWUF); one noncommercial educational FM facility (Station WXVS); and two full-time AM facilities (Stations WACL and WAYX). Brunswick, on the other hand, is currently served by five aural transmission facilities; two commercial FM facilities (Stations WIOI and WPIQ); two-full time AM facilities (Stations WMOG and WGIG) and one daytime-only AM facility (Station WNYR). BBC notes that Rowland's proposal would result in the licensing of six aural transmission facilities to Brunswick and five aural transmission facilities to Waycross. BBC states that a determination as to whether Rowland's proposal would result in a preferential arrangement of allotments must be made under priority four, "other public interest" of the Commission's FM broadcast channel allotment priorities. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982).Waycross has a population of 19,371 persons, according to the 1980 U.S. Census, whereas Brunswick has a population of 17,605 persons. Thus, BBC argues, Rowland proposes to reallot Station WBGA(FM) to a community with 1,766 fewer persons than its current community of license. BBC argues that Commission policy under the fourth-priority "other public interest" criterion favors the allotment of a contested channel to the more populated community, rather than to the less populated community, when the two communities have equivalent aural transmission service and when reception-service factors are not present. BBC asserts that the *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License Policy*, 4 FCC Rcd 4870 (1989), requires that changes in a station's community of license may be undertaken only when the proponent has demonstrated that a preferential arrangement of allotments would result. BBC argues that Rowland's proposal does not result in a preferential arrangement.

7. Rowland in reply comments states that BBC has submitted no information to demonstrate that the reallotment of Channel 273C1 from Waycross to Brunswick will not result in a preferential arrangement of allotments. Rowland claims that BBC's comments raise no new questions that need to be answered since BBC has merely restated the basis for the Commission's questions. Rowland asserts that the population of Waycross is decreasing at almost the same rate that Brunswick's population is increasing. Rowland contends that Brunswick has a greater need for the radio services of Station WBGA(FM) than does Waycross and should be the preferred community.

8. BBC in its reply comments states that Rowland has merely supplied material concerning various demographic, social, economic, industrial, business and other qualitative characteristics of Brunswick. BBC objects to consideration

of this material, arguing that consideration would invite a subjective weighing process, and would introduce the opportunity for "endless debate."

9. Based on the information before us, we find that the public interest would not be served by reallotting FM Channel 273C1 from Waycross to Brunswick, Georgia. Our analysis is based upon the transmission service gains and losses that would flow from the reallotment of the channel. Since Rowland is not proposing to change the transmitter site of Station WBGA(FM), reception service is not an issue.

10. Adoption of this proposal would provide a seventh transmission service to Brunswick, a community with a 1990 U.S. Census population of 16,433 persons.[1] Waycross, a community of 16,410, would retain five transmission services. While the loss of Station WBGA(FM) to Brunswick as a transmission service may be mitigated by the fact that five transmission services would remain in the community, we find that this proposal offers minimal public interest benefits to offset any disruption that would occur. There would be no improvement in the reception service already provided by the station. Station WBGA(FM) currently provides Waycross with a city-grade signal, and Rowland has provided no evidence suggesting that it is unable to provide Brunswick with any specialized service at this time. While the population of Brunswick may be increasing more rapidly than that of Waycross, and Rowland may perceive Brunswick to be in greater need of an additional reception service than Waycross, we do not believe that these factors justify the disruption that would result from removal of the transmission service at Waycross. *See Modification of FM and TV Authorizations to Specify a New Community of License (Memorandum Opinion and Order)*, 5 FCC Rcd 7094, 7097 (1990) (public has a legitimate expectation that existing service will continue, and this expectation is a factor to be weighed independently against service benefits that may result from reallotting a channel); *see also Report and Order (Van Wert, Ohio and Monroeville, Indiana)*, 7 FCC Rcd 6519 (1992).

11. Accordingly, IT IS ORDERED, That the petition for rule making submitted by Rowland Radio, Inc., to reallot Channel 273C1 from Waycross, Georgia, to Brunswick, Georgia, IS DENIED.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] We note that since this proceeding was initiated, an additional channel has been allotted to Brunswick. *See Report and Order (Brunswick, Georgia)*, 7 FCC Rcd 1029 (1992). Two applications are pending for the channel.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-484

In the Matter of

Amendment of Section 73.202(b),	RM-5948
Table of Allotments,	RM-6241
FM Broadcast Stations.	
(Provincetown, Dennis, Dennis Port,	
West Yarmouth and Harwich Port,	
Massachusetts)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: November 30, 1992; Released: December 28, 1992

By the Chief, Policy and Rules Division:

1. Before the Commission is a Petition for Reconsideration of the *Report and Order* in this proceeding, 4 FCC Rcd 7129 (1989), filed by Joan Orr ("Orr").[1] The *Report and Order* denied a petition for rule making filed by Brian Dodge ("Dodge"), which proposed an allotment of Channel 230A to Dennis Port, Massachusetts. The *Report and Order* also dismissed a joint counterproposal filed on behalf of Joan Orr ("Orr") and Marshfield Broadcasting Company, Inc. ("Marshfield") which proposed an allotment of Channel 232A to Dennis or Dennis Port, Massachusetts and Channel 230A to Provincetown, Massachusetts. Harvard Radio Broadcasting Co., Inc., filed an objection to Orr's petition for reconsideration. No other oppositions or reply comments were filed.

2. *Background.* This proceeding was initiated by a petition filed by Dodge, requesting the allotment of Channel 230A to Dennis Port, Massachusetts, as that community's first local FM service. The requested allotment required a substitution of Channel 226A for Channel 228A at Harwich Port, Massachusetts, and modification of the construction permit for Channel 228A that had been issued to Mary Jane Kelley ("Kelley"). The Commission issued a *Notice of Proposed Rule Making and Order to Show Cause*, 2 FCC Rcd 6793 (1987), in response to Dodge's request. The *Notice* specifically requested that Dodge indicate his willingness to reimburse Kelley for reasonable costs associated with the required modification of channels. The *Notice* also ordered that Kelley show cause as to why the assigned channel should not be modified.

3. In response to the *Notice*, a joint counterproposal was filed on behalf of Orr and Marshfield requesting an allotment of Channel 232A to either Dennis or Dennis Port, modification of the license of Station WOCB-FM, West Yarmouth, Massachusetts to specify Channel 236B in lieu of Channel 235B, and an allotment of Channel 230A to Provincetown, Massachusetts.[2] The counterproposal stated Orr's interest in applying for Channel 232A at Dennis or Dennis Port and indicated her willingness to reimburse Station WOCB-FM for reasonable expenses involved in changing frequencies, if she were the successful permittee. The proposal also stated Marshfield's intention to apply for Channel 230A at Provincetown. Marshfield subsequently filed a motion to withdraw the Provincetown portion of its counterproposal.

4. The *Report and Order* denied Dodge's petition because Dodge failed to indicate a willingness to reimburse the Harwich Port permittee for reasonable costs and expenses associated with the proposed change in frequency if Dodge were the successful applicant. The *Report and Order* also dismissed the counterproposal on grounds that Marshfield had withdrawn its portion and because Orr had failed to comply with Section 1.52 of the Commission's Rules concerning signing and verification.

5. Orr filed a petition for reconsideration stating that the Commission was wrong to deny her counterproposal for lack of signature and verification. Orr states that the joint counterproposal consisted of two separate but compatible proposals, one for an allotment of Channel 232A to either Dennis or Dennis Port, Massachusetts and Marshfield's proposal to allot Channel 230A to Provincetown. Orr states that the counterproposal was clearly, in effect, two separate proposals by two separate parties, each indicating a willingness to apply for the respective channels if allotted.

6. Orr claims that the *Report and Order* did not indicate how Orr failed to comply with Section 1.52 of the Commission's Rules. She assumes the failure resulted from the fact that her consultant filed the petition on her behalf, and that his signature was not valid for the purposes of verification. Orr states that it is common practice for technical and engineering consultants to file petitions for rule making and states that it is unclear why that practice was unacceptable in this case. Orr states that her consultant was acting on her behalf, with her authority.[3]

7. Harvard Broadcasting filed an objection to the petition for reconsideration stating that Orr's proposal is technically deficient and must be denied. Harvard contends that the proposed change in channels for Station WOCB-FM, West Yarmouth, will cause a short spacing to its Channel 237A, Cambridge, Massachusetts.[4]

8. *Discussion.* We will deny Orr's petition for reconsideration. Orr failed to properly sign and verify the counterproposal. Additionally, Orr failed to provide site coordinates, or to submit any evidence that operation from a specified site would meet the technical requirements of our rules.

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[1] Public notice of the filing of Orr's petition was given on November 24, 1989, Report No. 1802.

[2] Public Notice of the filing of the counterproposal was given on January 27, 1988, Report No. 1709.

[3] Orr also refers to her previous petition for rule making seeking an allotment at Dennis, Massachusetts. That petition was withdrawn, on Orr's request, upon the filing of the counterproposal in this proceeding. Orr claims that her earlier proposal was acceptable, and therefore the present counterproposal should also have been accepted. Because the earlier filed petition was withdrawn at Orr's request, we need not address that proposal in the context of this proceeding.

[4] Due to the resolution herein, we need not discuss Harvard's objection.

9. The *Report and Order* stated that "Orr's expression of interest is invalid for failure to comply with Section 1.52 of the Commission's Rules concerning signature and verification". Section 1.52 states, "A party who is not represented by an attorney shall sign and verify the document and state his address."[5] Absent an attorney, these statements may only be made by the party who holds such intent, and not on behalf of a party who has not come before the Commission to state its own intent.[6] Statements made by Orr's consultant on her behalf are insufficient for purposes of verification. Therefore, Orr's counterproposal was unacceptable when filed and was properly dismissed in the *Report and Order*. Due to the fact that Orr's counterproposal was dismissed on this procedural ground, other defects were not fully discussed in the *Report and Order*. However, we take this opportunity to discuss the technical deficiency of the proposal.

10. Orr's counterproposal was technically unacceptable as filed, as it did not provide information necessary for its consideration. Counterproposals must be technically correct and substantially complete when filed. At a minimum, we have held that the petitioner must provide the specific channel and class, specific transmitter site coordinates, and engineering studies which indicate that the station would meet the minimum separation and city grade coverage requirements of Sections 73.207(b) and 73.211 of the Commission's Rules.[7] Orr did not provide the requisite information concerning site coordinates or any engineering study. Therefore, Orr's proposal was technically unacceptable for lack of specific transmitter site coordinates and failure to state that the station could be operated from that site consistent with the Commission's technical rules.

12. IT IS THEREFORE ORDERED, That the Petition for Reconsideration filed by Joan Orr (RM-6241) IS DENIED.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[5] *See also, Amendment of Section 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911 (1990).

[6] *See, e.g., Carmel, Carmel Valley, Hollister and Scotts Valley, California*, 7 FCC Rcd 3056, 3057 (1992), *Lopez and Dushore, Pennsylvania*, 7 FCC Rcd 854 (1992).

[7] *See, e.g., Rockport, Gregory, Alice and Armstrong, Texas*, 4 FCC Rcd 8075 (1989), *Springdale, Arkansas, Carthage, Aurora and Willard, Missouri*, 4 FCC Rcd 674, recon. 5 FCC Rcd 1241 (1990), *Broken Arrow and Bixby, Oklahoma, and Coffeyville, Kansas*, 3 FCC Rcd 6507 (1988), Arnold and Columbia, California, 7 FCC Rcd 6302 (1992), *recon. pending on other grounds.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-216

In the Matter of

Amendment of Section 73.202(b), RM-8068
Table of Allotments,
FM Broadcast Stations.
(Clearwater and Rozel,
Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 4, 1992; Released: December 28, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 6270 (1992), proposing the substitution of Channel 254C2 for Channel 254A at Clearwater, Kansas, and modification of the construction permit (BPH-910412MD) for Channel 254A to specify operation on Channel 254C2. In addition, the *Notice* proposed the substitution of Channel 235C1 for Channel 254C1 at Rozel, Kansas, or deletion of the channel at Rozel if no interest is expressed in retaining a channel in the community. The *Notice* was issued in response to a petition filed by Gary Violet ("petitioner"). Petitioner filed comments restating his interest in the allotment at Clearwater. No other comments were received.

2. We believe the public interest would be served by substituting Channel 254C2 for Channel 254A at Clearwater, Kansas, in order to provide the area with additional reception service. As indicated in the *Notice*, Channel 254C2 can be allotted to Clearwater consistent with the Commission's spacing requirements at petitioner's specified site provided that Channel 254C1 is deleted at Rozel, Kansas.[1] No comments were received supporting retention of a channel at Rozel. Therefore, we will delete Channel 254C1 at Rozel which will allow petitioner to provide enhanced service to the community of Clearwater. We will authorize a modification of petitioner's construction permit for Channel 254A to specify operation on Channel 254C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 11, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Clearwater, Kansas	254C2
Rozel, Kansas	---

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Channel 254A, Clearwater, Kansas, IS MODIFIED to specify operation on Channel 254C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Gary Violet, permittee of Channel 254A, Clearwater, Kansas, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 254C2 at Clearwater are 37-23-31 and 97-35-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-215

In the Matter of

Amendment of Section 73.202(b),	RM-8063
Table of Allotments,	
FM Broadcast Stations.	
(Preston, Minnesota)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 4, 1992; Released: December 28, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 6228 (1992), issued in response to a petition filed by KFIL, Inc. ("petitioner"), proposing the substitution of Channel 276C3 for Channel 276A at Preston, Minnesota. Petitioner also requested modification of its license for Station KFIL-FM, Channel 276A, to specify operation on Channel 276C3. Petitioner filed comments in which it reaffirmed its interest in the channel.[1] No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 276C3 for Channel 276A at Preston, Minnesota, since it would provide the community with expanded service. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[2] We shall also modify the license for Station KFIL-FM, Channel 276A, to specify operation on Channel 276C3 in accordance with Section 1.420(g) of the Commission's Rules. We note that Channel 276C3 at Preston is short spaced to the allotment for Channel 278C2 at Waukon, Iowa, which has been reserved by Station KNEI-FM. Station KNEI-FM has a construction permit for Channel 278C2 at a site that is fully spaced to Channel 276C3 at Preston. The grant of a license for Channel 276C3 at Preston may be withheld pending issuance of a license for Station KNEI-FM, Waukon, on Channel 278C2.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 28, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Preston, Minnesota	276C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KFIL-FM, Preston, Minnesota, IS MODIFIED to specify operation on Channel 276C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

David H. Hogendorn
Station KNEI-FM
P.O. Box 151
Waukon, Iowa 52172

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, KFIL, Inc., licensee of Station KFIL-FM, Preston, Minnesota, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In response to the *Notice*, petitioner provided an affidavit verifying the statements in its petition for rule making.
[2] The coordiantes for Channel 276C3 at Preston are 43-44-38 and 91-54-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-198

In the Matter of

Amendment of Section 73.202(b), RM-8056
Table of Allotments,
FM Broadcast Stations.
(Larose, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 2, 1992; Released: December 28, 1992

By the Chief, Allocations Branch:

1. At the request of Electronics Unlimited, Inc. ("petitioner"), permittee of Station KMZM-FM, Channel 262A, Larose, Louisiana, the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 6222 (1992), proposing the substitution of Channel 262C1 for Channel 262A at Larose and the modification of Station KMZM-FM's construction permit to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 262C1 if allotted to Larose. No other comments were received.

2. We believe the public interest would be served by substituting Channel 262C1 for Channel 262A at Larose since it could provide the community with a wide coverage area FM service. Channel 262C1 can be allotted to Larose in compliance with the Commission's minimum distance separation requirements with a site restriction of 23.6 kilometers (14.7 miles) south to accommodate petitioner's desired site.[1] As proposed, we will also modify Station KMZM-FM's construction permit to specify operation on Channel 262C1 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 11, 1993**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Larose, Louisiana	262C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Electronics Unlimited, Inc., for Station KMZM-FM, Larose, Louisiana, IS MODIFIED to specify operation on Channel 262C1, in lieu of Channel 262A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Electronics Unlimited, Inc., permittee of Station KMZM-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 262C1 at Larose are North Latitude 29-22-00 and West Longitude 90-26-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-218

In re Applications of

ISIS BROADCAST GROUP	File No. BPH-880301MG
JOELMART, INC.	File No. BPH-880301MJ
GRAZIANO BROADCASTING COMPANY	File No. BPH-880301NA
PATRICIA WHEELER WODLINGER	File No. BPH-880301ND
CHANEL BROADCASTING	File No. BPH-880301NH
P & T COMMUNICATIONS, INC.	File No. BPH-880301NO
SANTA BARBARA COMMUNICATIONS, INC.	File No. BPH-880301NR
DEBORAH LYNN SCZUDLO	File No. BPH-880301OA
YING HUA BENNS	File No. BPH-880301OE
DELTA BROADCASTING, INC.	File No. BPH-880301OL

For Construction Permit for New
FM Station on Channel 299B1,
Santa Barbara, California

MEMORANDUM OPINION AND ORDER

Adopted: December 15, 1992; Released: December 28, 1992

By the Review Board: MARINO (Chairman) and GREENE. Board Member ESBENSEN absent.

1. On August 13, 1992, the Review Board released its Decision in this multi-party comparative proceeding, which granted the construction permit to Delta Broadcasting, Inc. *Isis Broadcast Group*, 7 FCC Rcd 5125 (Rev. Bd. 1992). Now before the Board is a petition for reconsideration, filed September 14, 1992, by Joelmart, Inc., which had been the successful applicant in the *Initial Decision* (7 FCC Rcd 599 (ALJ 1992)). Delta and Ying Hua Benns filed oppositions on September 28, 1992, and Joelmart replied on October 8, 1992. For the reasons that follow, we will deny Joelmart's petition.

2. In support of its petition, Joelmart argues that there is a fundamental uncertainty in the record as to the true nature of Delta's organizational structure, that is, whether its non-voting stockholder will be totally passive in station operations and whether its voting stockholder will exclusively control the enterprise. While not disputing the Board's findings appertaining to Delta's formation and its corporate documents, Joelmart submits that there was no documentation specifically restricting the voting rights of former, nominally passive owner John P. Franklin, Jr., and that Franklin testified that he might decide to help construct Delta's station after it receives a construction permit. Such activity, according to Joelmart, would contravene the Commission's holding in *Woods Communications Group, Inc.*, 7 FCC Rcd 78, 81 (1992), *recon. denied*, 7 FCC Rcd 4604 (1992). Joelmart further contends that the basic credibility of Delta's two-tier application is undermined by numerous testimonial conflicts and inconsistencies. The cumulative effect of these purported conflicts between the testimony of Franklin and that of Carol Hoffine, Delta's voting stockholder, or within Hoffine's own testimony, Joelmart argues, is to render Delta's integration proposal unreliable. Given the aforementioned testimonial problems, Joelmart contends, it is appropriate to examine Delta's formation, and the record shows that Delta was formed in a manner inconsistent with the exercise of sound business judgment. That is, Joelmart alleges, it is highly unlikely that Franklin would have given his money and turned over total control of Delta to Hoffine. At most, Joelmart states, Delta's integration credit should be limited to Hoffine's 30% equity share. Finally, Joelmart submits, once Delta's integration is disallowed or significantly reduced, Joelmart prevails comparatively over the remaining applicants.

3. It is well-settled that reconsideration will not be granted for the purpose of again debating matters on which the tribunal has already deliberated and spoken. *WWIZ, Inc.*, 37 FCC 685 (1965), *aff'd sub nom . Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); *Liberty Productions*, FCC 92-506, released November 23, 1992, at para. 29. Because Joelmart's petition largely reiterates matters that we already considered and rejected, and does not rely on new facts, changed circumstances, or material errors in our Decision, its request will be denied. Specifically, as to Franklin's rights at the time of Delta's corporate formation, we discussed those formative activities and reviewed the corporate documents Delta executed in this regard at paragraphs 32 and 33 of our Decision, and concluded, at paragraph 34, that the evidence established that Delta had timely and properly insulated its non-voting stockholder, Franklin, from active involvement with the station. (7 FCC Rcd at 5135-36). We also specifically considered at paragraph 35 (7 FCC Rcd at 5136) Franklin's single answer that his possible participation in construction could be addressed later in the overall context of the record, including his clear testimony that his involvement is limited to that of an investor, and concluded that Delta's integration proposal had not been undermined. In this respect, we referenced *Woods Communications Group* (in a "*compare*" cite) to distinguish the present circumstances from that case where the voting stockholder had agreed after formation of the corporation to the non-voting stockholder's demand that the articles of incorporation be amended to limit the former's rights. By contrast, we found here that the much more limited contact between Hoffine and Franklin did not destroy her exclusive management authority.

4. As for the alleged inconsistencies and conflicts in the testimony of Hoffine and Franklin, we have carefully reviewed the relevant portions of the record and find that none of the incidents provide any basis to reconsider our Decision. Several of the matters referred to by Joelmart, such as Hoffine's testimony regarding her Santa Barbara residence; the relationship of James Evans, Hoffine's friend and Franklin's business partner, to the Delta application; Hoffine's role in seeking investors for the proposal; Hoffine's and Franklin's financial investments in the applicant; and Franklin's understanding of what he was to contribute to the application costs, are all matters that were considered at paragraphs 36 and 38 of our Decision (7 FCC Rcd at 5136-37) and found not to undermine the credibility of the Delta proposal. Other alleged conflicts regarding such matters as whether the voting or non-voting stockholders could freely sell their stock; Hoffine's recollection regarding her negotiation of Delta's bank loan letter; and how many times Hoffine and Franklin remembered meeting between 1977 and 1988, were all adequately explained in the testimony of Delta's witnesses, and do not, of themselves, or in combination with the other asserted inconsistencies, cast doubt on the credibility of that testimony or otherwise meaningfully undercut the overall reliability of the applicant's integration proposal.

5. Finally, as to Joelmart's claim that Delta was not formed in the exercise of sound business judgment, we have already stated in our Decision at paragraph 36 (7 FCC Rcd at 5137) that, in hindsight, Delta's formation was not as businesslike as might be desirable. After careful evaluation of all the record evidence, however, we found that it was Franklin, the passive owner, rather than Hoffine, the active principal, who was vague about the details of the applicant; that Hoffine had broadcast experience; that she, not Franklin, pursued investors for the application; and that it was she who hired legal and engineering counsel. We therefore concluded, and repeat here, that Delta's formation does not warrant discrediting its proposal.[1]

6. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration, filed September 14, 1992 by Joelmart, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[1] Because we conclude that Delta's integration credit should not be reduced below 100%, Joelmart's claim that it prevails comparatively over the other applicants is moot. For the same reason, Benn's argument in its opposition, which is limited to the comparative contest between Benns and Joelmart, is also moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-403

In re Applications of

EVANSVILLE File No. BPH-870430OK
SKYWAVE, INC.

For Construction Permit for a New
FM Station on Channel 298A
at Evansville, Indiana

Appearances

Donald J. Evans on behalf of Evansville Skywave, Inc. and *Robert Zauner* on behalf of the Mass Media Bureau.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: December 17, 1992; Released: December 28, 1992

1. This decision will consider the facts determined in two hearings on the following issues:

(1) To determine whether Skywave is financially qualified to construct and operate the proposed Evansville, Indiana FM station.

(2) To determine whether Skywave has misrepresented facts or lacked candor in certifying that it is financially qualified to construct and operate the Evansville station, and, if so, the effect thereof upon its basic qualifications.

(3) To determine whether Sondra Matthews or Leon Perkinson misrepresented facts or lacked candor in their deposition testimony and, if so, the effect thereof upon the basic qualifications of Skywave.

2. A prehearing conference was held on November 16, 1988. Tr. 1-18. Hearing sessions to examine witnesses were held on August 13 (Tr. 165-278) and August 14, 1990. Tr. 280-306. A further hearing was held on September 15, 1992 (Tr. 307-75) pursuant to the Review Board's *Memorandum Opinion and Order*, 7 FCC Rcd 4099 (1992). The Board has directed that additional evidence be adduced to determine (1) what written financial information was before Bank One when it issued its April 1987 letter, both with respect to Skywave's principals and with respect to the proposed broadcast venture (including any financial statements, business plan, cost projection, and bank analyses); (2) whether Sondra Matthews supplied Bank One with any relevant financial data prior to the issuance of the original letter from Bank One in 1987. 7 FCC Rcd at 4101. In addition, the Board has directed specific findings on Matthews' representations about securing the 1987 letter from Bank One. 7 FCC Rcd at 4102. The record was closed on September 15, 1992. Tr. 375; *Order*, FCC 92M-957, released September 17, 1992. Proposed findings of fact and conclusions were filed by Skywave and the Mass Media Bureau on October 23, 1992. Replies were filed by both parties on November 3, 1992.

FINDINGS OF FACT[1]

3. In the mid-1980's, Leon Perkinson, President of Skywave Communications Corporation (SCC), the non-voting shareholder of Evansville Skywave, Inc. (Skywave), approached Anthony P. Schlichte, about lending money for several broadcast proposals. Skywave Exh. 3 at 7. Schlichte is Vice President and Senior Corporate Loan Officer for Bank One Indianapolis, N.A. Skywave Exh. 4. Schlichte testified that Perkinson told him about Skywave's plan to invest in about ten applicants for FM radio and television stations. *Id.* at 2. Schlichte said that Perkinson told him that "local participants, many of whom would be minority group members, would have difficulty in getting bank support, and he asked me if my bank would . . . provide a letter confirming our willingness to provide funds." *Id.* at 3.

4. Perkinson said he told Schlichte that SCC included most of the Midwest Mobilephone investors and they would have a "substantial non-controlling equity." Perkinson represented that Schlichte indicated that the involvement of the Midwest Mobilephone investors was sufficient for the bank to issue reasonable assurance letters. *Id.* at 8. "However," Perkinson said, "Mr. Schlichte did no[t] give me a carte blanche; I always understood that the bank would examine each situation to be sure it was willing to make a loan." *Id.* Perkinson testified in the 1990 hearing that "Bank One has not required guarantees or collateral from [SCC] at this time." *Id.* Perkinson represented that "[SCC] would certainly be willing to guarantee repayment of this loan," if required. *Id.*

5. Schlichte said he "expected" that SCC's principals would guarantee the loan from Bank One. Tr. 285. But he did not know whether they would because no loan application had been made and the structure of the applicant for Evansville had not been given to him. *Id.* He said it is unlikely that Bank One would make a loan to Skywave without "financial backing" from SCC principals. *Id.* He testified that it would be necessary for Perkinson to provide his personal guarantee. Tr. 286. Schlichte believed that the individual members of SCC would personally guarantee the loan. Tr. 290. In addition, he would require that the assets of the station be put up as collateral for the loan. *Id.*

6. Schlichte testified that Bank One's predecessor, American Fletcher National Bank, loaned Midwest Mobilephone Corporation money in 1983. Skywave Exh. 4. When the loan was made, Schlichte said, he reviewed financial

[1] The findings of fact in this decision supplement those findings made in the initial decision. If differences exist between the decisions, it is because the record as a whole reflects the findings made in this supplemental decision.

information about Midwest's major stockholders and he understands that SCC's owners are "virtually identical to Midwest's." *Id.* Schlichte testified that when SCC's owners sought the loan for Midwest they provided balance sheets and they complied with the conditions of the loan. Tr. 288. He said that he believed that "the financial statements that I had . . . I was under the impression . . . were part of Evansville Skywave." Tr. 287. "[B]ut, it could have been that some of these people that I [previously] dealt with were not part of Evansville Skywave." *Id.* Nevertheless, Schlichte said that when he wrote the bank's letter to Skywave on April 27, 1987, it was the personal financial information about the people he believed were principals of SCC that was the basis for sending the letter. Tr. 287.

7. Schlichte said that while he did not know who the owners of Skywave would be, the bank's letter "tries to set forth that upon favorable review of financial information, we most likely would be able to loan the money to this entity." Tr. 292. Schlichte conceded he does not know anything about how the Evansville facility will be owned. Tr. 289.

8. Schlichte testified that he could not remember the specifics of the financial statements he reviewed for the Midwest Mobilephone loan. Skywave Exh. 7 at 2. Despite that, he said that he believes the "financial standing" of even a few of SCC's owners would be satisfactory for backing the loan. *Id.* at 2-3. Schlichte was unable to produce the bank's records from 1983 for Midwest Mobilephone because the bank, he believes, discarded the files, which were in his desk, when he left the bank in 1988. Skywave Exh. 7 at 1-2. The only record available is a computer printout of the Midwest Mobilephone loan history. *Id.* at 1. Midwest Mobilephone was sold in 1986, a year before Bank One provided Skywave its loan letter. Skywave Exh. 6 at 3. It was Schlichte's recollection that while Midwest Mobilephone's loan was outstanding, Midwest's principals provided periodic financial statements. Skywave Exh. 4 at 3. Perkinson represented that Bank One had "personal financial information about him which probably [had] been updated at least yearly . . .." Tr. 260. He said he made it available when Midwest Mobilephone sought its loan in 1983. Tr. 260-61. Perkinson concedes that since Midwest Mobilephone provided information to American Fletcher National Bank for its loan, no new financial information has been provided. Skywave Exh. 6 at 3. Schlichte claims he has had periodic business contact with Perkinson. Skywave Exh. 4 at 2.

9. Perkinson said he did not make the arrangements for the Bank One letter. Tr. 260. He said he "called Tony [Schlichte] and told him that he would be receiving a call from Sondra Matthews from Evansville." Tr. 260. Skywave Exh. 3 at 7. Perkinson had earlier arranged for Peoples Bank and Trust in Indianapolis to lend "working capital" to Skywave. Tr. 198-99, 251. He had done the same with regard to another of SCC's applicants. Tr. 259. After he had arranged for that loan, he told Matthews about it by telephone. Tr. 199. Perkinson said he called Schlichte after Matthews told him that she had been unable to obtain a financing commitment from an Evansville bank. Skywave Exh. 3 at 7. Matthews testified that her banker in Evansville knew her and, when she asked him for a loan for the station, he said no. Tr. 338-39. Schlichte cannot remember how he was approached by Skywave for a bank letter. Skywave Exh. 4 at 3-4. He said the usual pattern was for Perkinson to call him, then the "co-venturer" would call, he would ask that person questions, and then provide the letter. *Id.* It really did not matter to Schlichte who the co-venturer or local shareholder was, nor was he interested in the technical proposal, in making the loan; he said they were not critical factors in making the loan "as long as I was comfortable with the ability of the Skywave principals" to repay it. Skywave Exh. 4 at 4; Tr. 292-93.

10. On April 27, 1987, Schlichte sent Skywave a letter from Bank One. Matthews testified that the letter is Skywave's commitment to cover construction and operation of the Evansville station. Tr. 214. She represented that she "arranged for it." Tr. 215. Although, she assumed that Perkinson had already spoken to Schlichte when he had told her to call him. *Id.* She said that Schlichte was not surprised to hear from her. Tr. 216. Matthews said she called Schlichte and provided him with information about how she made her living and "a little" about her background. Skywave Exh. 5. Matthews claims that Schlichte told her to send him a letter about her proposal. *Id.* It was only to be a general letter and Schlichte did not ask her anything specific about Skywave's proposal. Tr. 320, 321. Matthews has no copy of the letter. Skywave Exh. 5. She said she told him about herself; she may have sent a resume; and she may have sent him information about what it typically costs to build a radio broadcast station. *Id.* She believes she also included a sample bank letter. *Id.* Schlichte and Bank One have no record of receiving the letter. *Id* at 2.

11. During the first hearing sessions in 1990, Matthews was shown the April 1987 letter from Bank One and asked:

> Q. Did you provide any financial information to Bank One?
>
> A. Yes.
>
> Q. At what point was that?
>
> A. At the time I submitted -- prior to submitting this letter. Tr. 216.

12. Matthews was then shown the March 30, 1990 letter from Bank One and the April 28, 1987 letter from Bank One and asked whether she provided Schlichte with "financial information prior to issuance of this 1987 letter?" Tr. 216. She answered yes. Tr. 217.

> Q. What sort [ ] of information did you provide to Bank One?
>
> A. I gave him information about myself, in terms of my own financial situation, who I am. I gave him some estimates on what I thought the costs would be . . ..
>
> Q. Was this over the telephone?
>
> A. I sent the information through the mail. Tr. 217.

13. After a recess was held, Skywave's counsel asked Matthews, "In getting the first letter that you got from Bank One, the one back in 1987, you indicated that you did provide to Mr. Schlichte, such cost estimates. Did you provide a personal financial statement of yours to him?" Tr. 225. Matthews said yes. Tr. 225. Schlichte said he could not recall receiving any written financial information about Matthews. Tr. 288-89. Schlichte did say he did not know Matthews before Bank One issued the letter and "most likely" her personal guarantee would be required. Tr.

288-89. After Matthews had testified in response to three sets of questions that she had sent Schlichte financial information about herself, she and her counsel discussed the inconsistency between her testimony and Schlichte's. Skywave Exh. 5 at 3-4. During the 1992 hearing, she said that all she meant when she represented that she had provided Schlichte with financial information was that she sent him her resume. *Id.* at 3. She then said she had not sent Schlichte her personal financial statement. *Id.* at 2. Matthews urged that by telling Schlichte that she owned and ran a newspaper she was indicating something about her financial capability. But she did not tell him in 1987 whether her biweekly newspaper was successful. Tr. 319. Perkinson testified that "he was not too sure" that he provided financial information about SCC or Skywave to Schlichte. Tr. 261.

14. A sample bank letter is attached to Matthews' testimony which she claims she sent to Schlichte in 1987. Since she said she did not have a copy of any of the materials sent to Schlichte, she was asked how she knew this one was the same letter. Matthews then said, "I have a copy in my files." Tr. 322. Matthews testified that Schlichte asked her to send him a proposal. Tr. 330. The sample loan letter had blanks but Matthews cannot remember whether she filled in the blanks. Tr. 331. When Matthews was asked where she outlined her proposal in her letter to Schlichte, she appeared to say she had not had enough time to think about where she had done so. Tr. 331-32. She then admitted that the documents attached to her testimony were "not copies of what I kept. These are copies that my attorney had that he used to reconstruct what was sent in the package," she said. Tr. 334. She then stated that except for her resume she kept no documents sent to Schlichte. *Id.*

15. Skywave needed $400,000, Matthews said, but only $126,800 was needed to build the station. Tr. 348. She never told Schlichte that the remainder would be used for application prosecution costs. Tr. 348-49. Although, Matthews concedes that the sample loan letter attached to her testimony came from her counsel, she maintains it is the same letter that Perkinson gave her and she in turn gave to Schlichte. Tr. 351-52. When examined, she said she could remember the first paragraph. Tr. 354. Matthews represented, "I can remember doing by hand, putting in the $300,000." Since shortly before Matthews said she could not remember if she filled in the blanks in the letter, she was asked, "you did fill in the letter?" Her response was yes. *Id.* When it was pointed out that she had just said she did not know whether she had filled in the letter. Matthews testified, "I don't recall saying I didn't know." *Id.*

16. When probed, Matthews then explained that she had more than one sample letter that she received from Perkinson. Tr. 355. She said, "I didn't pick one of them [to send to Schlichte]. I think I made a composite." Tr. 356. Matthews conceded that the letter attached to her testimony was not the one she sent to Schlichte. Tr. 356. In making a request for money from Schlichte, Matthews testified that she asked for $150,000 extra because "banks don't always give you what you ask for, and people do put more in in order to cover their unexpected costs." Tr. 358. Then Matthews said, with certainty, that when she sent her letter to Schlichte she asked for $400,000. Tr. 359. When Schlichte said the bank would lend that amount, she claimed, despite her testimony, she was not surprised. Tr. 359. She told Perkinson that she had requested $400,000. Tr. 360-61. She said she discussed the sample loan letter she wrote with her counsel but "I don't think he had any comments about it one way or the other because I think it was just a process . . .."

17. Matthews said her sample letter for Schlichte did not include language about personal guarantees or repayment. Tr. 364. When it was pointed out that her written testimony said that the letter attached to her testimony is the sample letter she sent to Schlichte (Skywave Exh. 5 at 1-2), she said the statement was "correct in that I think it is a sample, part of the sample. It's not the whole sample." Tr. 365. She then said she did not write her testimony, her counsel did. Tr. 367. She did not tell him the sentence was incorrect because she did not realize it. *Id.* Schlichte testified that the letter he sent to Skywave was a prototype letter that he had sent to SCC entities that were filing broadcast applications. Skywave Exh. 4 at 3.

18. There is another incident in the record which warrants findings because it reflects on the credibility of Matthews. During the 1992 hearing, Matthews was asked if she ever borrowed money from a bank. Tr. 335. She said she had borrowed money in order to buy a house. Tr. 335. She said the bank may have asked her for some information before they made the loan but they used her mother's credit. Tr. 336. Matthews' response to a series of questions about that transaction illustrates additional evasive testimony.

> Q. [The bank] did not ask for any financial information about you at all?
>
> A. I don't recall. They used my mother's [credit].
>
> Q. Your mother owns the house?
>
> A. My mother owns several houses . . .
>
> Q. . . . She owns [your] house or [do] you own it?
>
> A. As far as the bank was concerned at that time, she owned it. Tr. 336.

CONCLUSIONS

Did Skywave Supply Relevant Financial Information to Bank One and Are Its Representations About Obtaining A Letter from Bank One Candid and Reliable?

19. Skywave has requested that Bank One Indianapolis, Indiana finance its proposal. On April 27, 1987, Bank One in a letter signed by Anthony P. Schlichte "confirm[ed] the willingness" of Bank One to lend Skywave "up to $400,000 for the purpose of constructing and operating an FM Radio Station." Skywave Exh. 2 at Attach. C. The Review Board has requested a supplemental decision about what "written financial information" Bank One had before it about Skywave's principals and the proposed station. The Review Board would like to know, in addition, whether Skywave principal Sondra Matthews supplied Bank One with relevant financial data. Matthews, Schlichte, and Leon Perkinson, President of SCC (Skywave's only other owner besides Matthews) provided written testimony. Matthews and Perkinson also appeared in 1990 and 1992 hearing sessions for examination and Schlichte appeared in 1990.

20. Schlichte states that Bank One will look to the shareholders of Skywave's nonvoting shareholder to personally guarantee the loan. He said the bank will "most likely" also require Skywave's only voting shareholder, Matthews, to personally guarantee the loan. There is no reliable evidence in the record that Skywave or SCC pro-

vided financial information about the individual shareholders to Bank One before the April 1987 letter was written and sent by Schlichte to Skywave. Schlichte said he did receive financial statements from SCC shareholders when, as owners of the cellular radio telephone company, Midwest Mobilephone, Midwest borrowed money from Bank One's predecessor bank, American Fletcher National Bank. That loan was apparently made in 1983, four years before the letter was provided to Skywave. The loan was repaid and Midwest Mobilephone was sold in 1986, all before the letter was sent to Skywave. Schlichte was unable to produce the financial records he or Bank One had for SCC's stockholders and the owners of Midwest Mobilephone. He thinks they were in his desk and were thrown away when he left the bank in 1988. Schlichte believes that SCC's stockholders provided periodic updates to their financial statements while the loan was outstanding. In any event, Schlichte admits he did not consult those records before he wrote the letter for Skywave; he relied on his memory.

21. Schlichte said he could not remember the specifics of the financial statements he reviewed for the Midwest Mobilephone loan but, nevertheless, he believed the "financial standing" of even a few of SCC's owners would be satisfactory for backing the loan to Skywave. Schlichte conceded that, when he issued the letter in 1987, he did not know who the owners of Skywave would be or even how the Evansville facility would be owned. He represented that "most likely" Bank One would lend money to Skywave if, when a loan application is made, there is a favorable review of financial information. Schlichte has always "been under the impression" that SCC's stockholders were the same as the owners of Midwest Mobilephone. Perkinson agrees with Schlichte that no new financial information was provided to obtain the letter from Bank One for Skywave. SCC owns 75 percent of the equity in Skywave.

22. Schlichte has no recollection of receiving any financial or other information from Skywave's only voting shareholder, Sondra Matthews, and there is none in the bank's files. Although Schlichte apparently received no financial or other information from Matthews, he said Bank One "most likely" would also require her personal guarantee. There is nothing in the record that establishes either that she would provide such a guarantee or that, if she did, the bank could realistically look to her to satisfy any debt owed by Skywave. Matthews testified that the Evansville banker she approached, who knew her well, refused to provide a letter for a loan for this facility.

23. Matthews claimed in response to repeated questioning during the 1990 hearing sessions that she sent Schlichte financial information. She gave that testimony in response to Bureau counsel's questions and, after a recess, in response to questions by Skywave's counsel. Because her answers were categorical, her current denial that she sent Bank One financial information in 1987 and her excuse that she only meant in her 1990 testimony that she told Schlichte what her job was when she said she provided him with financial information, amounts to no more than an effort to make her testimony consistent with Perkinson and Schlichte's. From the presiding officer's observation of Matthews, it is evident she understood the question, the reason for the question, and she deliberately gave the disputed answers. Skywave has not established that there was any truth to her claim whatsoever. Matthews was repeatedly given an opportunity to correct her answer and she did not.

24. Her testimony this year also leads to the conclusion that her response to questions about what she sent to Schlichte before he issued his letter is unreliable and lacks candor. Matthews attached to her testimony what she said was a copy of a sample bank letter that she sent to Schlichte. Schlichte testified that he had used the same form letter that he had used with other SCC applicants. Since Matthews had said she did not have a copy of what she sent to Schlichte in 1987 and Bank One had no record or recollection of receiving any information from her in 1987, she was asked where the sample bank letter had come from that was included with her testimony. She testified she had a copy in her files. When asked whether she filled in the blanks in the letter she could not remember. Then she conceded the documents attached to her testimony were not from her files at all but had been provided by counsel for her testimony. However, she claims, it is the same letter Perkinson gave her in 1986 or 1987. She then said she did fill in the blanks in the letter and denied any recollection of having just said she could not recall whether she had filled them in. Finally, she said she wrote the sample bank letter she sent to Schlichte and it was a composite of several sample bank letters she had. She said her letter did not include language providing for personal guarantees or repayment. She conceded that the letter attached to her testimony was not the one sent to Schlichte. When it was pointed out to her that in her written testimony she said the letter attached to her testimony was the sample letter she sent to Schlichte, she said some of the letter was part of the composite she had sent. In the end, when it was evident her written testimony was untruthful, she said she did not write her testimony, her counsel did.

25. It was very difficult to ask Matthews a question during the hearing which elicited a reliable answer. For example, she claimed she bought a house with a bank loan. But the more she was questioned, it appeared her mother bought the house and the bank relied only on her mother to pay the loan. There is no question that Matthews' demeanor lacked candor. It is also evident that Matthews understood the questions being asked and that she was knowledgeable about Skywave's proposal. But her answers indicated that she was unsure which answer would best serve her interest. Repeatedly, Matthews was forced into changing her testimony when the inconsistency of her oral testimony with her written and earlier oral statements, and the statements of other witnesses, was called to her attention. The result is that her testimony about what she told Bank One in writing is unreliable. Bank One has no record of what information she provided, if anything, and the loan officer has no recollection either. Skywave has not established that Bank One had information which could have resulted in reasonable assurance of a loan to Skywave.

26. In answer to the Board's questions, there is no objective evidence from the bank's records that Schlichte had available any financial statements, business plan, cost projection or bank analysis before he wrote his 1987 letter. While Bank One loan officer Schlichte said he had familiarity with SCC's stockholders from a 1983 loan to Midwest Mobilephone, those documents had been submitted four years previous and the company had been sold by SCC stockholders a year before Skywave sought reasonable assurance of a loan for Evansville. In any event, there is no evidence that Schlichte reviewed the Midwest Mobilephone documents, that he sought assurance from the SCC stockholders that their financial status was the same as it had

been when the Midwest Mobilephone loan was made, or that he determined that the SCC stockholders were, in fact, the same as Midwest Mobilephone's. Schlichte assumed that the SCC stockholders were the same as they represented in 1983.

27. Skywave has not established that Sondra Matthews supplied Bank One with any relevant financial data about herself or Skywave's proposal before the bank issued its 1987 letter. The evidence submitted by Skywave is unreliable and, when probed, turned out not to be as was represented.

Does Bank One's Letter to Skywave Represent Reasonable Assurance?

28. When SCC decided it would put together applicants for radio and television stations, Perkinson talked with Schlichte and told him about SCC's plans. Perkinson said that Schlichte told him that because Midwest Mobilephone stockholders were to be involved, Bank One would issue reasonable assurance letters to SCC applicants. But Perkinson qualified that claim: Schlichte did not give SCC carte blanche; Perkinson "always understood that the bank would examine each situation to be sure it was willing to make a loan."

29. Perkinson said that the bank had not required guarantees or collateral from SCC but that SCC would be willing to guarantee repayment, if required. Bank One's letter does not state that that would be required. Schlichte said in the letter that the "loan will be subject to our customary covenants, terms and conditions." At the hearing, however, Schlichte testified that he "expected" SCC principals to guarantee the loan and that "most likely" Matthews would have to also. In addition, the assets of the station would have to serve as collateral. There is no evidence that Schlichte discussed either of these conditions with Matthews, and Perkinson said that he had not been told. Schlichte indicated that the reason he had not addressed guarantees and collateral before he sent the letter was because he does not know how the Evansville facility would be owned. Even under his assumption that former Midwest Mobilephone stockholders would be involved, Schlichte said he only had a general recollection of the "financial standing" of SCC's stockholders and he did not initiate a review of their financial condition at the time the letter was sent in 1987.

30. Schlichte said that usually Perkinson would refer SCC's co-venturer to him. When that person called, he would ask questions and issue the letter. He used the same letter in each instance. He never looked at the proposal and, apparently, because Perkinson had told him that SCC's partners would generally be people who would have trouble obtaining a bank loan, he did not believe they would be critical to making the loan. Schlichte had no actual recollection of talking to Matthews or of having looked at any written material she may have provided.

31. Matthews did not tell Schlichte, and Schlichte apparently did not ask, why $400,000 would be needed to construct and operate this particular station. Actually, Matthews explained, only $126,800 would be needed to build the station. The remaining amount would cover operating the station but most of the money would be used to repay Skywave and SCC's expenses in obtaining the permit. According to Schlichte's April 1987 letter, the money from Bank One was to be used only for construction and operation of the station. Skywave did not explain whether Bank One would be willing to provide funds which would not be devoted to establishing the business. Schlichte said that Bank One had never financed an SCC broadcast entity.

32. It still is the case, after this supplemental hearing, that Skywave has not established reasonable assurance of a committed source of funds. *Evansville Skywave, Inc.* 7 FCC Rcd 4099, 4100 (Rev. Bd. 1992). Bank One did not have a long and established relationship with Skywave to infer that it was thoroughly familiar with Skywave's assets, credit history, current business plan, and similar data. *Id.* Bank One's familiarity was with the owners of Skywave's nonvoting stockholder and their cellular radio telephone business. Schlichte did not review their assets at the time Skywave sought the $400,000; instead he relied on his memory of a 1983 transaction involving an entirely different business. Schlichte said that the bank had no interest in information about Matthews, who purportedly holds 100 percent control, or the proposal for the business. He never discussed how collateral would be established with anyone at Skywave. Skywave has not shown that the bank examined the borrower. There is nothing in Schlichte's testimony that indicates that he considered Skywave's request as a bank officer might have, if he or she were seriously considering making the loan. In Schlichte's 1992 written testimony, his name is misspelled throughout. He signed the testimony which he evidently did not prepare and appeared not to have read since he made no effort to correct the error. Schlichte was not orally examined by the Bureau in the 1992 hearing.

33. Schlichte explained that the letters he wrote for SCC applicants resulted from a promise he made to Perkinson before SCC had even decided where it might apply for broadcast stations, and before SCC decided whether it would apply for radio or television stations. Schlichte then used the same form letter for each request from an SCC applicant. The same procedure was followed each time and it did not involve an assessment of the viability of the proposal or the credit worthiness of the borrower. Skywave has not demonstrated that it had reasonable assurance for the funds needed to construct and operate the Evansville facility when Matthews certified the applicant's financial qualifications on the application. Because Skywave's testimony is unreliable and it has failed to demonstrate that it is financially qualified its application will be denied.

ACCORDINGLY, IT IS ORDERED that the application of Evansville Skywave, Inc. (File No. BPH-870430OK) IS DENIED.[2]

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 21, 1992
Released: December 30, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Calnevar Broadcasting, Inc.	8210-BH
Licensee, Stations KBAS and KWAZ	C3-382
2332 Highway 95, Suite A	C6-154
Bullhead City, Arizona 86442	C5-627

Dear Sir or Madam:

This letter constitutes a Notice of Apparent Liability for a forfeiture in the amount of twelve thousand, five hundred dollars ($12,500) pursuant to Section 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and the Commission's Rules. This action is being taken by the Chief of the Mass Media Bureau pursuant to the delegation of authority in Section 0.283 of the Commission's Rules.

BACKGROUND

On May 22, 1991, the Commission sent you a letter of inquiry to determine whether Stations KWAZ, Needles, CA, and KBAS, Bullhead City, AZ, violated the anti-lottery provisions by broadcasting a commercial for a slot machine tournament to be held at the Edgewater Hotel/Casino from March 21 to March 23, 1991. The Commission also requested tapes or transcripts of all commercials aired by your stations on behalf of the Edgewater Hotel/Casino from March 6, 1991, to the date of our inquiry.

In your June 5, 1991, response you stated that KWAZ broadcast the subject commercial 18 times and KBAS broadcast the subject commercial 17 times from March 6 to March 8, 1991. You stated that you received inquiries from several of the Edgewater's competitors on whether the subject commercial might violate the Commission's anti-lottery provisions. Although you believed the commercial did not violate those provisions, you "pulled" the commercial on March 8, 1991.

Included with your response was "A Guideline for Advertising Legally," which appears to come from an advertising seminar given in Las Vegas, Nevada, in June 1989. You highlighted this statement from that document: "[T]hus, a slot machine tournament that has elimination rounds can be advertised over radio and T.V., but a non-tournament poker game cannot." On May 22, 1992, you wrote a follow-up response in which you argued that the tournament rules allowed participants to play the slot machines as fast as possible. You argued that this rule eliminated the chance element since speed is a function of skill, and a faster player would have a greater chance of winning than a slower player.

In response to the Commission's request that you provide transcripts of other commercials KWAZ and KBAS aired for the Edgewater Hotel/Casino, your June 5, 1991, response included a commercial apparently broadcast beginning in January 1991 and either continued until (or rebroadcast on or after) March 6, 1991. It was titled "Unstoppable Party," and contained the following language: "It's a party 24 hours of play every day all month long . . . play double your paycheck on the spin and win wheel . . . hourly drawings for cash and prizes." Among the prizes offered were "free play coupons." The transcript for the commercial also included the phrase "[T]his is what you've been waiting for a hotel/casino that loves to pary (sic)."

DISCUSSION

A lottery is a scheme containing the elements of prize, chance and consideration. Although you do not deny that the slot machine tournament you advertised contained prize and consideration, you argue that it involved skill, not chance. You rely on two factors: (1) material from an advertising seminar indicating that if slots are part of a *tournament* the event is not a lottery, and (2) speed of play eliminating chance as a factor in determining the winner.

Contrary to your argument, the slot machine tournament that you promoted contained the element of chance as well as the elements of prize and consideration. First, the Commission has not ruled that slot machine tournaments are non-lotteries. It has ruled that where a *poker* tournament involves a closed-ended arrangement in which all players start with an equal amount of money and play in a "winner-take-all" elimination contest, without limit as to time, the contest is a game of skill. Since chance is such an inherent part of playing slot machines, the same criteria would not make slot machine schemes games of skill. Second, the advantage gained from the ability to play quickly is not sufficient to change a slot machine tournament from a game primarily of chance to a game primarily of skill. The slot machine tournament was, accordingly, a lottery.

The commercial for the "Unstoppable Party" also appears to promote lottery activities taking place 24 hours a day. While the commercial used the word "free," usually in reference to prizes as in "free stays at the Edgewater," the commercial did not state adequately whether or how participants could play lottery activities without surrendering consideration. *Cf. Public Notice Concerning Lotteries and Sales Promotions*, 18 FCC 2d 52 (1969). (Any announcement of a promotional scheme which depends upon the reasonably equal availability of free chances should adequately describe the availability of such free chances and the locations, times, and manner in which they may be obtained.)

Additionally, by offering "free play coupons" as prizes, the commercial appears to be promoting lottery activities that one would have to pay to enter. Furthermore, by broadcasting the term "casino" in the phrase "[T]his is what you've been waiting for a hotel/casino that loves to pary (sic)," you improperly promoted lottery activities. The only way that the term "casino" can be broadcast to promote an establishment that conducts lotteries is when it is used as part of the proper name of a multi-use establishment. When it is so used, of course, the advertisement may refer only to non-lottery activities that occur at such an establishment. *See Letter to Stephanie Yarbough* (Mass Media Bureau, September 25, 1990).

CONCLUSION

In sum, your advertisements for the slot machine tournament appear to have promoted a scheme that contained all the elements of a lottery. Your reliance on inaccurate information concerning the legality of promoting this lottery does not absolve you of responsibility for broadcasting the advertisement in question. Moreover, the "Unstoppable Party" commercial that you broadcast appears to have promoted a lottery and to have provided information concerning ongoing lottery activites at the Edgewater Hotel/Casino, as discussed above.

In view of the foregoing, it appears that Stations KWAZ, Needles, California, and KBAS, Bullhead City, Arizona, violated 18 U.S.C. Section 1304 and Section 73.1211 of the Commission's Rules at least in January 1991 and from March 6-8, 1991. We are assessing a forfeiture only against Station KBAS, and only for broadcasts after March 5, 1991. Action against January 1991 broadcasts by KBAS and KWAZ, as well as action against KWAZ for the March 6 through March 8, 1991, broadcasts is barred by the statute of limitations (*see* 47 U.S.C. Section 503(b)(6)) because the Commission granted license renewals after those violations occurred, which was more than one year ago. You are hereby admonished with respect to the apparent January 1991 violation by KBAS and KWAZ and the March 1991 violations by KWAZ.

With respect to KBAS, Calnevar Broadcasting, Inc. is hereby advised, pursuant to Section 503(b) of the Communications Act of 1934, as amended, of its apparent liability for a forfeiture of twelve thousand, five hundred dollars ($12,500).

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992) *pet. for review pending sub* nom. USTA v. FCC, No. 92-1321 (D.C. Cir. filed July 30, 1992). Under these standards, $6,250 is the base forfeiture for a lottery violation. Because the violation was repeated, the forfeiture amount is increased and the total forfeiture amount is twelve thousand, five hundred dollars ($12,500).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Temporary Waiver of the Maritime
Service Rules (Part 80) to Permit
Higher Powered Operation of 406 MHz
Emergency Position Indicating
Radio Beacons.

ORDER

Adopted: December 21, 1992; Released: December 30, 1992

By the Chief, Private Radio Bureau:

1. In a letter dated August 12, 1992, the United States Coast Guard (Coast Guard) requested that the Commission issue a general waiver of Section 80.1061 of the Commission's Rules, 47 C.F.R. § 80.1061, to permit manufacturers to increase the operating power of the 121.5 MHz homing beacon, which is integral to 406 MHz Emergency Position Indicating Radio Beacons (406 EPIRBs). 406 EPIRBs are small, battery powered transmitters carried on ships for the purpose of sending a distress signal in an emergency. The distress signal consists of a digital message transmitted on 406.025 MHz and a homing signal transmitted on 121.500 MHz. The digital message is used both to identify the EPIRB and to provide an estimate of its location, usually within 3 kilometers, and the homing signal is used by aircraft and ships to determine the beacon's actual location.

2. According to the Coast Guard, pilots of search and rescue (SAR) aircraft have had difficulty homing in on the 121.500 MHz signal in 406 EPIRBs. Because these pilots have not reported the same difficulties with Class A and Class B EPIRBs[1] the Coast Guard believes the problem is primarily due to the radiated power of the 121.500 MHz signal.[2] The issue of homing beacon power in 406 EPIRBs was discussed by the Radio Technical Committee for Maritime Services (RTCM) Special Committee 110 (Committee)[3] and the Committee proposed revising the "RTCM Recommended Standards for 406 MHz Satellite Emergency Position-Indicating Radiobeacons (EPIRBs)", hereafter Recommended Standards, to allow increased power.[4] According to the Coast Guard, RTCM plans to send the revised Recommended Standards to the Commission for consideration in the near future. Until a rule change can be made, however, the Coast Guard requests a general waiver to allow 406 EPIRB homing beacons to operate at increased power.[5]

3. Normally, we would wait for the industry to submit a proposal and then investigate it through a rule making proceeding. Because of the safety of life issue and the support of both the Coast Guard and RTCM, however, a temporary general waiver would seem appropriate. Further, such a waiver may be useful in obtaining information that would be helpful in a rule making proceeding. Therefore, we will allow homing beacons in 406 EPIRBs to operate at increased power. For the purposes of this waiver we will not specify a maximum power, only a minimum power.[6] Homing beacons operating under this waiver must not operate at a power less than 25 mw ERP.

4. This Order will provide a general waiver of Section 80.1061 of the Commission's Rules, 47 C.F.R. § 80.1061, to permit the higher powered operation of 406 EPIRBs on the frequency 121.500 MHz. In order to operate under this general waiver, a manufacturer must amend its 406 EPIRB type acceptance to reflect the power increase on 121.500 MHz. Such higher powered operation should allow SAR aircraft to locate a 406 EPIRB's homing beacon from greater distances, thereby improving safety of life at sea.

5. Operation under the terms of this general waiver is strictly voluntary. Therefore, this Order does not affect manufacturers who do not wish to increase homing beacon power in their 406 EPIRBs. This Order will become effective immediately, and will remain in effect until December 31, 1995.

6. IT IS THEREFORE ORDERED, pursuant to the authority contained in Sections 0.331 and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.3, that Section 80.1061 of the Commission's Rules, 47 C.F.R. § 80.1061 IS WAIVED to the extent that 406 EPIRBs may transmit a homing signal on 121.500 MHz of not less than 25 mw ERP. This Order is effective on the date adopted, and remains in effect until December 31, 1995.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

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[1] Class A and Class B EPIRBs transmit alternatively on 121.5 MHz and 243.000 MHz, but the Coast Guard only uses 121.5000 MHz for homing.

[2] Class A and B EPIRBs must transmit at least 75 mw effective radiated power (ERP) on 121.500 MHz. The power of the 121.500 MHz homing beacon in a 406 EPIRB, however, is not presently specified in ERP, but as the power measured to a 50 ohm load. The specified power for the 121.500 MHz homing beacon is 25 mw (-2, +3 dB).

[3] 406 EPIRBs carried on U.S. vessels must comply with the requirements specified in RTCM Recommended Standards for 406 MHz EPIRBs.

[4] Several manufacturers attending the meeting indicated their willingness to increase power.

[5] The Coast Guard recommends a PERP of 25 mw (-0, +6 dB).

[6] Because EPIRBs must operate on battery power for a minimum of 48 hours, manufacturers try to conserve the power used.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ad Hoc Telecommunications Users Committee
Petition for Declaratory Ruling

AT&T Tariff F.C.C. No. 11 Local Channel Charges

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1992; Released: December 30, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Ad Hoc Telecommunications Users Committee (Ad Hoc) petitions the Commission to declare that American Telephone and Telegraph Company (AT&T) is required to flow through, on a dollar-for-dollar basis, reductions in local exchange carrier (LEC) special access rates to AT&T's Tariff F.C.C. No. 11 local channel charges.[1] For the reasons set forth below, we deny Ad Hoc's petition.

II. BACKGROUND

2. AT&T resells, through Tariff 11, LEC special access service for customers which take private line service through AT&T's Tariff 9.[2] With a few exceptions, AT&T obtains the facilities used to provide Tariff 11 circuit components from LECs pursuant to LEC special access tariffs, and resells those facilities to customers at rates contained in Tariff 11.[3] AT&T's private line customers need not obtain local access circuits from AT&T. Customers may directly (or through a third party) obtain from the LECs any special access services necessary to complete AT&T's private line service.[4] As a third alternative, those customers may order AT&T's access coordination function (ACF), a service under which AT&T obtains and coordinates the necessary local channels on their behalf, but the LEC provides the channel to the customer directly.[5]

3. When the Commission adopted price cap regulation for AT&T in 1989, Tariff 11 was excluded from price caps because AT&T competed in the provision of special access as a reseller of LEC service. The Commission reasoned that the imposition of price caps on rates that were already effectively capped by the rates the LECs would charge was superfluous.[6] Subsequently, the *Interexchange Report and Order* adopted streamlined tariff review for AT&T services excluded from price cap regulation, including Tariff 11.[7]

III. PLEADINGS

A. Ad Hoc Petition

4. Ad Hoc argues that AT&T's failure to flow through changes in LEC access charges since mid-1990 is unlawful and contrary to Commission Rules and policies. Ad Hoc Petition at 1, 5-6. Ad Hoc contends the Commission established a requirement in 1987 that AT&T must flow through all access charge reductions implemented by LECs on a dollar-for-dollar basis.[8] Ad Hoc argues the Commission has always considered Tariff 11 a flow-through tariff for that purpose, citing a 1985 order that Ad Hoc claims described it as such.[9] Ad Hoc asserts that AT&T has consistently acknowledged the flow-through nature of Tariff 11. *Id.* at 3.

5. Ad Hoc argues that when incentive regulation of AT&T was initiated, the flow-through requirement was made an integral part of the price cap plan: Section 61.44 of the Commission's Rules identifies special access rate changes as exogenous cost changes which would trigger adjustments to AT&T's price caps. *Id.* at 2-3. Ad Hoc also maintains that Tariff 11 was not brought under price cap regulation due precisely to its status as a flow-through tariff. According to Ad Hoc, the "uncertainty" surrounding the regulatory requirements for Tariff 11 should be removed by issuing a declaratory ruling confirming that AT&T is obligated to flow through special access rate reductions on a dollar-for-dollar basis, and directing AT&T to reduce its local channel service rates to capture all LEC rate reductions which have not been passed on to Tariff 11 customers.

B. AT&T Opposition

6. AT&T argues that Ad Hoc's requests are contrary to Commission precedent and inconsistent with the competitive choices available to customers in obtaining access. AT&T Opposition at 1.[10] AT&T disputes Ad Hoc's claim

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[1] The Ad Hoc Telecommunications Users Committee Petition for Declaratory Ruling, filed July 26, 1991 (Ad Hoc Petition).

[2] *See* AT&T Communications Tariff F.C.C. Nos. 9, 10 and 11, Transmittal Nos. 285, 318, 342, 346, Memorandum Opinion and Order, 103 F.C.C. 2d 77, 80 (1985) (*1985 Tariff 11 Order*).

[3] *See* AT&T Communications Tariff F.C.C. Nos. 9, 10 and 11, Transmittal Nos. 285, 318, 342, 346, 504 and 559, CC Docket No. 85-400, Memorandum Opinion and Order, 3 FCC Rcd 4579 (1988) at para. 1 (*1988 Tariff 11 Order*).

[4] *See 1985 Tariff 11 Order*, 103 F.C.C. 2d at 101; *1988 Tariff 11 Order*, 3 FCC Rcd at 4590; Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873, 3037 (1989) (*Price Cap Order*), *recon.*, 6 FCC Rcd 665 (1991), *remanded in part on other grounds sub nom. American Telephone and Telegraph Co. v. FCC*, No. 91-1178 (D.C. Cir. Sept. 8, 1992).

[5] AT&T Opposition at 4-5. *See 1985 Tariff 11 Order*, 103 F.C.C. 2d at 91.

[6] *See Price Cap Order*, 4 FCC Rcd at 3037.

[7] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5914 (1991) (*Interexchange Report and Order*).

[8] Ad Hoc Petition at 1-2, *quoting* AT&T Communications, Revisions to Tariff F.C.C. Nos. 1, 2, 11, 13 and 14, Transmittal Nos. 1063 and 1064, Memorandum Opinion and Order, 3 FCC Rcd 263 (Common Carrier Bur. 1987)(*1987 Tariff 11 Order*).

[9] Ad Hoc Petition at 3, *citing 1985 Tariff 11 Order*, 103 F.C.C. 2d at 86.

[10] AT&T Opposition to Ad Hoc Petition for Declaratory Ruling, filed Aug. 8, 1991 (AT&T Opposition).

regarding the Commission's 1987 order, which directed AT&T to flow through a particular set of access reductions, explaining that the flow-through applied primarily to switched interstate services, did not establish a general flow-through requirement, and did not discuss a special requirement for Tariff 11 rates.[11]

7. AT&T also disagrees with Ad Hoc's characterization of the Commission's 1985 order, arguing that the Commission was directing AT&T to create structural consistency to facilitate customer comparisons of actual rates for alternative service configurations, and that the Commission was not requiring that AT&T's rate levels match those of the LECs.[12] AT&T points out that the Commission in that order held that competition would serve as a check on rate levels.[13]

8. AT&T argues that the reason Tariff 11 was not brought under price cap regulation was because competitive alternatives to purchasing service under Tariff 11 were available to customers.[14] AT&T notes that even if Tariff 11 were under price caps, access rate reductions, as exogenous cost changes, could only change the cap for an entire basket of services, would not have to flow through to any particular rate element or service, and might not even result in a rate change if AT&T's rates were well under the cap. AT&T Opposition at 7. AT&T also argues that the same competitive factors preventing AT&T from implementing unreasonable rates in Tariff 11 underlie the streamlined regulation applied to Tariff 11 in 1991. *Id.* at 8.

C. Ad Hoc Reply

9. Ad Hoc disputes AT&T's characterization that a flow-through requirement is unnecessary based on competitive factors. Ad Hoc Reply at 3.[15] Ad Hoc maintains that competitive checks on Tariff 11 rates were an ancillary consideration, not the primary basis for excluding Tariff 11 from price caps regulation. *Id.* at 6. Ad Hoc adds that AT&T essentially buys access at "wholesale" prices by obtaining high volume DS3 facilities for completing connections, but sells individual voice grade circuits at "retail" to its customers. *Id.* at 3-4. Finally, Ad Hoc contends that for most users, acquiring special access facilities directly from LECs is not a viable alternative because it is too complicated. *Id.* at 7-8.

IV. DISCUSSION

10. The Commission, pursuant to Section 1.2 of its Rules, may issue a declaratory ruling "terminating a controversy or removing uncertainty."[16] In this case, Ad Hoc has not shown that its interpretation of AT&T's obligations with respect to Tariff 11 is correct. For the period from 1990 to present, during which Ad Hoc alleges AT&T failed to flow through special access reductions in Tariff 11, there was no requirement of a dollar-for-dollar flow-through of LEC special access rates to AT&T's customers. A study of relevant cases reveals nothing more than general descriptions of Tariff 11 as a "flow-through" tariff, descriptions that cannot be translated into a requirement of a dollar-for-dollar flow-through.

11. AT&T filed Tariff 11 in 1985 as part of a restructuring of its interstate private line service, to reflect the effects of divestiture and the implementation of access charges.[17] The tariff was modified in accordance with the Commission's investigation of special access tariffs[18] in order to make AT&T's tariffs and LEC special access tariffs structurally parallel, facilitating a customer's ability to compare the rates of AT&T, the LECs and alternative service providers.[19] AT&T filed additional modifications in 1986 to align pricing of its local channels with the rate structure of the exchange carriers.[20] The Commission never intended AT&T's rates under Tariff 11 to always mirror LEC access rates -- indeed, the Commission repeatedly noted that customers were free to order service from the LECs if they thought AT&T's rates were unreasonable.[21] Like Ad Hoc, some commenters contended in 1985 that making comparisons among AT&T, the LECs and alternative providers would be too complicated. The Commission responded that the difficulties AT&T customers may have faced in comparing prices for complex circuits "simply reflect the decisional responsibility confronted by all actors in an evolving environment that more closely approximates a competitive market. Customers -- especially sophisticated commercial entities -- are expected to assess their alternatives and choose between them."[22]

12. Contrary to Ad Hoc's contention, the Commission did not in 1987 create a requirement that AT&T flow through, on a going-forward basis, access rate reductions to Tariff 11. The Bureau's 1987 order addressed questionable cost support AT&T filed to justify rates for the tariff period beginning January 1, 1988, when AT&T was under rate of return regulation. After noting the deficiencies in the support, the Bureau permitted the rates to take effect subject to an investigation, on the condition that AT&T flow through to its rates the full amount of switched and special access rate reductions. The order did not specifically impose any special requirement for Tariff 11 rates, nor did it establish a dollar-for-dollar flow-through requirement for that tariff.[23] Moreover, there is no basis on which to construe the decision on that tariff as creating a rule of prospective applicability, because an order beginning an investigation does not constitute a finding that the interim condition there imposed be followed in all future filings.

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[11] *Id.* at 2, *citing 1987 Tariff 11 Order*, 3 FCC Rcd 263.
[12] AT&T Opposition at 2-3, *citing 1985 Tariff 11 Order*, 103 F.C.C. 2d at 86.
[13] AT&T Opposition at 3, *quoting 1985 Tariff 11 Order*, 103 F.C.C. 2d at 90, 91, 101.
[14] AT&T Opposition at 6-7, *quoting Price Cap Order*, 4 FCC Rcd at 3037.
[15] Ad Hoc Reply to Opposition to Petition for Declaratory Ruling, filed August 20, 1991 (Ad Hoc Reply).
[16] 47 C.F.R. Section 1.2.
[17] *See 1985 Tariff 11 Order*, 103 F.C.C. 2d 77.
[18] Investigation of Access and Divestiture Related Tariffs, Phase I and Phase II, Part I, 102 F.C.C. 2d 1007 (1985).
[19] *See 1985 Tariff 11 Order*, 103 F.C.C. 2d at 121.
[20] *See 1988 Tariff 11 Order*, 3 FCC Rcd at 4590.
[21] *See 1985 Tariff 11 Order*, 103 F.C.C. 2d at 101, 121-22. *1988 Tariff 11 Order*, 3 FCC Rcd at 4590.
[22] *1985 Tariff 11 Order*, 103 F.C.C. 2d at 121-22.
[23] *See 1987 Tariff 11 Order*, 3 FCC Rcd 263.

13. Nor did implementation of incentive regulation in 1989 establish a flow-through requirement for Tariff 11. The Commission specifically excluded Tariff 11 from price caps because such regulation appeared unsuited to Tariff 11.[24] The Commission reasoned that the goal of the new regulatory scheme -- to give AT&T incentives to lower its costs by being efficient and innovative -- would not be served by including Tariff 11. First, because "the vast bulk of the costs of providing Tariff 11 service are LEC special access rates, AT&T has minimal ability to act on the incentives to lower costs provided by price caps."[25] Second, Tariff 11 rates were already effectively capped by competition from LECs. The Commission found that "AT&T's ability to alter Tariff 11 rates is severely limited by the fact that customers are free to purchase special access services directly from the LECs."[26] Since Tariff 11 is excluded from price caps, there is no requirement that changes in access rates be treated as exogenous cost changes. In addition, while the language in the price cap order describes Tariff 11 as a "pass through" or "flow-through" tariff, no language in the order requires dollar-for-dollar reductions in Tariff 11 to mirror LEC access reductions.[27]

V. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED that the petition for declaratory ruling filed by The Ad Hoc Telecommunications Users Committee IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[24] *Price Cap Order*, 4 FCC Rcd at 3037.
[25] *Id.*
[26] *Id.*
[27] As AT&T argues, the Commission could have adopted such a requirement based on the record before it, since parties had recommended that result in their pleadings. *Price Cap Order*, 4 FCC Rcd at 3032. AT&T contends that commenters in the price cap proceeding sought, but did not receive, the same relief Ad Hoc seeks here, and concludes that Ad Hoc should have presented a timely petition for reconsideration or an appeal of the price cap orders. AT&T Opposition at 8. Because we are denying this petition, we need not reach AT&T's argument that the petition should be dismissed as an untimely petition for reconsideration.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, ET AL.,
Complainants,

v.

THE CONTINENTAL TELEPHONE COMPANIES,
Defendants.

File No. E-89-396

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints
and Investigations Branch
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: December 21, 1992; Released: December 30, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1989, the Competitive Telecommunications Association, Inc. (CompTel), on the behalf of ITT Communications Services, Inc. (ITT), filed the above-captioned formal complaint against The Continental Telephone Companies (Contel) seeking damages resulting from Contel's alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986. On October 6, 1992, however, CompTel filed a motion for partial dismissal requesting that ITT be dismissed from the complaint because ITT had taken an insufficient amount of service from Contel to warrant further pursuit of its claim.[1]

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that CompTel's Motion for Partial Dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

[1] While complainant has requested a partial dismissal of the above-captioned proceeding, we note that ITT is the only party filing a complaint against Contel in File No. E-89-396. Accordingly, we will dismiss the complaint in its entirety.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Jody Barnes File No. 1129-CM-P-83

For Authority to
Construct and Operate
a Multichannel Multipoint
Distribution Service station
on the E-group channel at
Midland, Texas

ORDER ON RECONSIDERATION

Adopted: December 22, 1992; Released: December 30, 1992

By the Chief, Domestic Facilities Division:

1. This matter concerns a petition for reconsideration of the dismissal by the Domestic Facilities Division (the Division) of the above-captioned application of Jody Barnes (Barnes) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channel at Midland, Texas and for reinstatement of the application. For the reasons discussed below, we deny the petition.

I. BACKGROUND AND CONTENTIONS

2. As the result of a Commission lottery, held on July 28, 1986, Barnes' application was selected for qualification review. Subsequently, the Division initiated a qualification review of the application pursuant to Section 21.32 of the Commission's Rules, 47 C.F.R. § 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Barnes was legally, technically, financially, and otherwise qualified to be a licensee, and that grant of the application would serve the public interest. By letter dated September 25, 1986, Barnes was notified of these deficiencies and provided an opportunity to cure them within thirty (30) (days of the date of the letter.[1] In this deficiency letter, Barnes was advised that failure to file the requested information within thirty days of September 25, 1986 could result in the dismissal of her application. This letter was addressed to Jody Barnes, at Route 1, Box 195, Kenai, Alaska 99611.[2]

3. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d) of the Commission's Rules, 47 C.F.R. §§ 21.13(c), 21.20(d), and 21.28(d) and by letter dated March 23, 1988, the Division dismissed, without prejudice, Barnes' application for failure to comply in a timely manner with its request for information.

4. On April 22, 1988, Barnes submitted a petition for reconsideration of the Division's dismissal action. Barnes maintains that reinstatement of the application would be in the public interest because: (1) she has substantially complied with the staff's request for information by curing most of the outstanding deficiencies; and (2) no deficiency letter was received by Barnes, therefore no penalty should be imposed against her for failing to respond to the Commission's requests for information.

II. DISCUSSION

5. As of the date of the Division's deficiency letter, September 25, 1986, and almost two years after the Division's request for information, Barnes still had not submitted the information necessary for evaluation of her qualifications to be an MMDS licensee. For example, Barnes had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by Section 21.15(a), 47 C.F.R. § 21.15(a).[3] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to lottery. However, once the lottery is held, a license will not be granted until a fully-executed lease, option agreement or, other concrete evidence of site availability is submitted. *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987). Thus, Barnes' statement that a site was available in 1983, when she submitted her application, did not constitute "concrete evidence" of the availability of her proposed transmitter site.

6. In addition, Barnes failed to submit the required current financial qualification demonstration by October 25, 1986.[4] Also, Barnes failed to comply with the request to submit a Section 21.902(i) non-interference analysis. Section 21.902(i) requires MMDS applicants to submit, prior to receiving a construction authorization and at such time

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[1] The deficiencies cited were the absence of: (1) a signed lease or option to lease agreement, pursuant to 47 C.F.R. § 21.25(a); (2) current financial data, pursuant to 47 C.F.R. § 21.17(b); (3) type-accepted transmitters, pursuant to 47 C.F.R. § 21.120; (4) non-affiliation statement, pursuant to 47 C.F.R. §§ 21.900, 21.903(b)(1) and 21.903(b)(2); and (5) the answers to questions on FCC Form 435 pages 4 and 6.

[2] The FCC Form 430 (Common Carrier and Satellite Radio Licensee Qualification Report) as well as other correspondence from Barnes related to this application, provided the same return address.

[3] Section 21.25(a) provides, *inter alia:* "Applicants proposing a new station location... shall indicate whether the station site is owned. If it is not owned, its availability for the proposed radio station site shall be demonstrated. Under ordinary circumstances this requirement will be considered satisfied if the site is under lease or under written option to buy or lease... "Barnes presents no argument as to why it should be exempted from "ordinary circumstances" treatment, which would require by the terms of this rule provision that a lease or written option to buy or lease be submitted. In addition, Barnes was required pursuant to Section 21.13(c) to submit a lease or option agreement after Division staff stated in the September 25, 1986 letter that a lease or option agreement was required for qualification review purposes and requested Barnes to submit it. Section 21.23(c) provides, *inter alia:* "In addition to the general application requirements of §§21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact... (2) As the Commission, at any time after the filing of an application... may require from any applicant... to enable it to determine whether a radio authorization should be granted."

[4] We note that a financial certification was submitted on May 17, 1988, after the dismissal of Barnes' application.

as the Commission requests, an analysis demonstrating that the proposed MMDS facilities will not cause harmful interference to existing co-channel or adjacent channel Instructional Television Fixed Service (ITFS) receiver locations within fifty (50) miles of the MMDS transmitter, or alternatively, an "interference-acceptance" statement from the affected ITFS licensee. By the express language of this rule, an MMDS applicant must submit a non-interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by October 25, 1986, Barnes failed to do so. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

7. With regard to Barnes' statement that she failed to receive a copy of the deficiency letter, we note that if an applicant fails to provide the Commission with an address which is inadequate for mail delivery purposes, then the applicant assumes the risk of non-delivery. *See* 47 C.F.R. § 1.65 (applicant is responsible for continuing accuracy of pending application and shall amend information that is no longer substantially accurate within 30 days); *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519 (Common Car. Bur. 1990). In addition, no attorney appeared for, submitted a document on behalf of or was otherwise designated as authorized to act on Barnes' behalf. The Commission's direct communication, at the address furnished by the applicant, was appropriate.

8. Barnes had a duty to submit curative amendments to her application, as directed by the Division, no later than October 25, 1986, or seek an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Her failure to submit curative amendments for almost two years substantially impeded the expeditious offering of MMDS in Midland. In view of the foregoing, dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement is not justified.

III. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Jody Barnes regarding its Midland, Texas MMDS application is denied.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

December 21, 1992

Released: December 30, 1992

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Mr. Terry Arnold 8310-FC
Bell Broadcasting Company C6-604
Licensee, Radio Station WJZZ(FM)
2994 East Grand Boulevard
Detroit, MI 48202

Dear Mr. Arnold:

This letter constitutes a NOTICE OF APPARENT LIABILITY for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

The Commission received a complaint dated May 11, 1992, alleging a violation of Section 73.1216 of the Commission's Rules ("licensee-conducted contests") by WJZZ(FM), Detroit, MI. The complainant alleged that WJZZ(FM) conducted a contest promotion in which participants in the contest had to correctly identify the required number of songs played on WJZZ(FM). Winners in the contest were awarded trips as prizes. The complainant asserted that during the contest promotion on January 30, 1992, she correctly identified the required number of songs played on WJZZ(FM) in order to win a trip to Mexico. She alleged, however, that although she was a winner, the station refused to award her the prize.

By letter dated June 4, 1992, the Commission initiated an inquiry into the matter asking for your comments concerning the complainant's allegations. In your responses dated June 22, 1992, and July 15, 1992, you state that WJZZ(FM) did, in fact, conduct the subject contest promotion which awarded trips as prizes to callers who correctly identified the required number of songs played on WJZZ(FM). You indicate that WJZZ(FM) conducted an investigation regarding the complainant's allegations and discovered that the complainant called the station on January 30, 1992, and spoke with Mr. Larry Elliott, the disc jockey on duty at the time of the subject contest. You admit that the complainant correctly identified the required number of songs played on WJZZ(FM) in order to win a trip. You state that Mr. Elliott contends that he did not award the complainant a prize because he already had a winner. You explain that a search of WJZZ(FM)'s records pertaining to the subject contest was made and confirm that the station's records fail to show the complainant or any other individual as having won a trip to Mexico on January 30, 1992. You contend that WJZZ(FM) now considers the possibility that Mr. Elliott's recollection of the contest may be incorrect. Moreover, you assert that WJZZ(FM) has decided to award the complainant a Mexican trip equivalent to the trip which was involved in the contest.

Based on the foregoing, it appears that Radio Station WJZZ(FM) violated Section 73.1216 of the Commission's Rules by failing to conduct the contest substantially as advertised. Although you eventually awarded the Mexican trip to the complainant, you did so, only after the Commission became involved in the matter.

Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Bell Broadcasting Company, licensee of Radio Station WJZZ(FM), is hereby advised of its Apparent Liability for a Forfeiture in the amount of $6,250 for its apparent willful violation of Section 73.1216 of the Commission's Rules. The amount of the forfeiture was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act and in our recently adopted *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied* FCC 92-212 (released June 4, 1992). Under these standards, $6,250 is the base forfeiture amount for a violation of Section 73.1216 of the Commission's Rules.

In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

December 21, 1992

Released: December 30, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Sequoyah Communications, Inc.	8210-BH
Licensee, Station WQBB	C10-316(91)
1114 W. Clinch Ave. Suite 1A	C12-070(91)
Knoxville, TN 37916	C2-636
	C5-094
	C5-116
	C5-638

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a forfeiture in the amount of six thousand, two hundred and fifty dollars ($6,250) pursuant to Section 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and Section 73.1211 of the Commission's Rules. This action is being taken by the Chief of the Mass Media Bureau pursuant to the delegation of authority in Section 0.283 of the Commission's Rules.

BACKGROUND

On April 16, 1992, the Commission sent you a letter of inquiry concerning information it had received alleging that Station WQBB, in October 1991, had broadcast a commercial for the "Kentucky Cash Five" lottery, which was described as "new from your Kentucky Lottery." Your response, filed May 26, 1992,[1] stated that WQBB broadcast commercials for the "Kentucky Cash Five" lottery and for "Kentucky Lotto," both of which you believed to be parts of the Kentucky state lottery. You provided records which indicate that you broadcast those commercials approximately 250 times between September 27, 1991, and December 7, 1991.

DISCUSSION

The broadcast of lottery advertisements is prohibited by 18 U.S.C. Section 1304 and Section 73.1211 of the Commission's Rules. There is an exception to that prohibition, in 18 U.S.C. Section 1307(a)(1)(B) and Section 73.1211(c)(1) of the Commission's Rules, for certain broadcasts concerning state-conducted lotteries. However, this exception permits broadcast advertising of state-conducted lotteries only by stations that are licensed in a state that conducts a state-conducted lottery. Since Tennessee does not conduct a state-conducted lottery, the exception does not apply to any station, such as WQBB, that is licensed to a location in Tennessee.

In your response you admitted broadcasting the subject advertisements, but offered the following substantive arguments against further Commission action on this matter. First, you indicated that you misunderstood your responsibilities concerning the broadcast of lottery promotions because you had seen similar advertisements run on other Knoxville, Tennessee, media including newspapers, billboards, cable systems and radio stations. Second, you noted that you were advised by counsel that there was a question about the legality of broadcasting the subject commercials. You stated that you added the words "[L]ottery is legal in Kentucky, illegal in Tennessee" in an attempt to comply with the law as you understood it. Third, you described the policy that you instituted subsequent to receiving the Commission's inquiry in order to assure that your station will comply with the lottery broadcast law.

The arguments that you present do not persuade us to excuse the violations. First, any confusion that resulted from your having seen similar advertisements on other Knoxville media will not reduce your forfeiture. The Commission does not consider ignorance of the law to be a mitigating factor. *Southern California Broadcasting Company*, 6 FCC Rcd 4387 (1991). Second, a licensee will not be excused from its obligation to comply with the Commission's Rules because of advice given to it by counsel. Indeed, the language that you added at the end of the commercials after consulting with an attorney is irrelevant to the lottery proscription. Finally, it is well established that a licensee will not be excused from past violations because of subsequent remedial measures. *Cate Communications Corp.*, 60 RR 2d 1386 (1986).

CONCLUSION

Although your station is licensed in a state that does not conduct a state-conducted lottery, you broadcast advertisements for the Kentucky state lottery. Thus, it appears that Station WQBB, Powell, Tennessee, willfully and repeatedly violated 18 U.S.C. Section 1304 and 47 C.F.R. Section 73.1211 from September 27, 1991, until December 7, 1991. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Sequoyah Communications, Inc., is hereby advised of its apparent liablity for a forfeiture of six thousand, two hundred and fifty dollars ($6,250). The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom.* USTA v. FCC, No. 92-1321 (D.C. Cir. filed July 30, 1992). Under these standards, $6,250 is the base forfeiture for a lottery violation.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTE

[1] Upon timely request from WQBB's counsel, the due date for WQBB's response was extended to May 26, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

December 21, 1992

Released: December 30, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

DR Partners	8210-BH
Licensee, Station KOLO-TV	C4-281
4850 Ampere Drive	C6-281
Reno, NV 89502	C7-112
	C7-424

Dear Sir or Madam:

This letter constitutes a Notice of Apparent Liability for a forfeiture in the amount of twelve thousand, five hundred dollars ($12,500) pursuant to Section 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and Section 73.1211 of the Commission's Rules. This action is being taken by the Chief of the Mass Media Bureau pursuant to the delegation of authority in Section 0.283 of the Commission's Rules.

BACKGROUND

The Commission sent you a letter of inquiry, dated May 26, 1992, concerning allegations that Station KOLO-TV had, on April 8, 1992, broadcast a commercial which featured a video depiction including the words "Bonanza Casino the friendliest casino in town." The inquiry stated that the use of the word "casino" is promotional of a lottery and may be used in a broadcast only when the word is part of the legal name of a multi-purpose establishment.

Your response, filed July 10, 1992,[1] provided tapes and transcripts of five commercials aired by your station on behalf of the subject advertiser. Three of the five commercials you provided show a car with these words painted on its side: "Bonanza Casino, Live Entertainment-4720 N. Virginia St-The Friendliest Casino in Reno, NV."[2] These three commercials were apparently aired approximately 130 times between February 13, 1992, and June 28, 1992. The two remaining commercials that you submitted contain the word "casino" only in "Bonanza Casino," which you demonstrated, through stationery and printed advertising, to be the advertiser's name.

In your response you argued that the commercials do not contain information concerning a lottery and do not promote any lottery activity. You denied liability based on the argument that the term "casino," as it is used in the phrase "the friendliest casino in town," is employed as part of a service mark type of slogan. You asserted that, as such, it is intended to have only the secondary meaning of being a place that offers "food, entertainment, lodging, relaxation and enjoyment." While you noted that the term "casino" "may comprehend gaming activity," you argued that it is not synonymous with gambling.

Additionally, you took issue with the Commission's position regarding the term "casino" on the grounds that it is an impermissibly broad construction of the lottery statute. In support of your position you asserted that no reported decision of the Commission has so construed the statute or the Commission's Rules. To further support your overbreadth argument, you cited several prior decisions in your response. You cited *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954), and *N.Y. State Broadcasters Ass'n v. United States*, 414 F.2d 990, 995 (2d Cir. 1969), *cert den.*, 296 U.S. 1061 (1970), for the proposition that the lottery statute is a penal provision that must be narrowly construed. You cited *N.Y. Broadcasters, supra*, at 997, to support the claim that the statute's restrictions are applicable only when applied to particular existing lotteries. Finally, you suggested that *George P. Mahoney*, 29 RR 2d 609 (1974), might be relevant to the interpretation of Section 1304.

DISCUSSION

We disagree with your argument that you did not broadcast commercials promoting any lottery activity. The word "casino" is promotional of a lottery and may be used in a broadcast only when the word is part of the legal name of a multi-purpose establishment. The three commercials that included the phrase "the friendliest casino in town" promoted lotteries by use of the word "casino" other than as part of the legal name of a multi-purpose establishment.

We find your argument concerning the use of "casino" as a service mark to be unpersuasive in determining liability. If a phrase promotes lottery activities it does not fall beyond the scope of the lottery proscriptions by being part of a service mark type of slogan. Furthermore, the assertion that a term which "comprehends," or promotes lottery activities may also have some secondary or additional meanings is irrelevant to whether that term promotes lottery activities.

We also find your overbreadth argument unconvincing as applied to this case. The narrow exception for the broadcast use of the term "casino" does not make the restriction on other uses of "casino" an overly broad construction of the lottery statute. The Commission's position on this matter is well established and has been the subject of previous declaratory opinions. *See Letter to J. Dominic Monahan* (Mass Media Bureau, July 21, 1987); *Letter to Stephanie Yarbough* (Mass Media Bureau, September 25, 1990). This Commission policy was also stated in the recently released *Notice of Apparent Liability to Channel 33, Inc.*, 7 FCC Rcd 3224 (Mass Media Bureau, 1992).

Consequently, even though we agree that 18 U.S.C. Section 1304 must be narrowly construed, and that the term "casino" may be restricted by Section 1304 only when used in connection with a particular existing lottery, the commercials that you broadcast did promote such a lottery, since the Bonanza Casino conducts ongoing lottery activities. The cases you cite supporting narrow construction and supporting enforcement of the statute only in case of a particular lottery do not, therefore, change our conclusion. In addition, the *George P. Mahoney* decision which you also cite, is inapposite to any issue in this case. Rather, it

delineates permissible information that may be broadcast in connection with a legitimate non-promotional news story, which is not at issue here.

CONCLUSION

You broadcast three advertisements that included the word "casino" outside of the legal name of a multi-purpose establishment. It appears, therefore, that you broadcast promotions for lottery activities. Thus, it appears that Station KOLO-TV, Reno, Nevada, willfully and repeatedly violated 18 U.S.C. Section 1304 and 47 C.F.R. Section 73.1211 from February 13, 1992, until June 28, 1992. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, DR Partners is hereby advised of its apparent liablity for a forfeiture of twelve thousand, five hundred dollars ($12,500).

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). Under these standards, $6,250 is the base forfeiture for a lottery violation. Because the violation was repeated, the forfeiture amount is increased for a total forfeiture of twelve thousand, five hundred dollars ($12,500).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] Upon timely request from KOLO-TV's counsel, the due date for KOLO's response was extended to July 10, 1992.

[2] These words are visible for approximately two seconds (as the car drives by) in two commercials, which feature a discussion of food available at the Bonanza Casino, and for approximately six seconds (the car drives into the picture and stops) in another commercial, which features two dogs that are associated with the Bonanza.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Commonwealth Broadcasting
of Northern California

Licensee of Radio Station
KMZQ-FM, Henderson, NV

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1992; Released: December 30, 1992

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a $12,500 Notice of Apparent Liability (NAL)[1] issued August 5, 1992, to Commonwealth Broadcasting of Northern California (CBNC), licensee of Station KMZQ-FM, Henderson, Nevada; and (2) CBNC's response to the NAL filed September 4, 1992.

2. The NAL was issued for an apparent violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304 and Section 73.1211 of the Commission's Rules. The Commission found the licensee promoted a lottery by advertising a "Car-A-Day in May" event at the Palace Station Hotel and Casino and also promoted ongoing lottery activities at the Palace Station because the commercial contained a jingle with the phrase: "The Palace Station, play the favorite." The NAL found that the "Car-A-Day in May" promotion contained the elements of chance, prize and consideration. CBNC had contended that the event eliminated the element of consideration by permitting non-purchasing individuals to participate. The NAL, however, found that consideration was present because purchasers received additional entries and CBNC had failed to demonstrate that reasonable parity existed between purchasers and non-purchasers. The facts are set forth in full detail in the NAL.

3. In its response to the NAL, CBNC presents the following in an effort to mitigate the forfeiture. First, CBNC repeats its argument that the phrase: "The Palace Station, play the favorite" does not promote lottery activities. Second, CBNC asserts that the violations were not willful because the station believed that the commercial did not promote a lottery. Third, the licensee asserts that the upward adjustment of the forfeiture amount for the violation being repeated was improper and resulted in a disproprtionately high forfeiture when compared with other cases. Fourth, CBNC cites its previous compliance record. And fifth, CBNC asserts that the Commission's interpretation of what constitutes a lottery is incorrect because it applies a federal, rather than a state, standard.

4. CBNC presents no new arguments concerning the phrase "[T]he Palace Station, play the favorite." The licensee repeats its argument that the the jingle refers only to the Palace Station being "#1" in a newspaper poll because the subject phrase is preceded by the phrase "[T]he Palace Station, #1 in town." Contrary to CBNC's assertion in its response to the NAL, the Commission considered the entire context of the jingle before determining that the subject phrase promoted lottery activities and we remain unpersuaded by the licensee's repetition of its earlier arguments on this matter. The question is not whether the Palace Station was "the favorite." Rather, it was whether the phrase "*play* the favorite" (emphasis added) promoted ongoing lottery activities at the establishment. We found that it did and remain unpersuaded otherwise.

5. Next, the licensee argues that the violation was not willful because "KMZQ honestly did not believe that the "Car-A-Day in May" contest was a 'lottery' prior to the station's broadcast of commercials promoting it." CBNC mistakes the meaning of "willful" as that term is used in Section 503(b) of the Communications Act of 1934, as amended. As noted in *Southern California Broadcasting Company*, 6 FCC Rcd 4387 (1991), the legislative history of the 1982 amendment to the Communications Act demonstrates that Congress intended "willful," as used in Section 503(b) to mean that "the licensee knew he was doing the act in question, regardless of whether there was an intent to violate the law." (Citation omitted).

6. CBNC's dispute with the upward adjustment of the forfeiture for being repeated (to $12,500 from a base amount of $6,250) centers on its assertion that the Commission has issued forfeitures in the same amount involving violations that were of greater duration or involved a greater number of promotions. In its response to the NAL, CBNC states that KMZQ-FM broadcast commercials promoting the subject lottery approximately 51 times. However, the records submitted by CBNC in response to our original inquiry indicate that CBNC broadcast the commercial for the subject lottery 79 times. Moreover, we do not find the upward forfeiture adjustment made for KMZQ-FM's repeated violation at variance with Commission precedent so as to require greater explanation than provided in the NAL. Furthermore, the Commission "is not bound to deal with all cases at all times as it has dealt with some that appear comparable." *Triple X Broadcasting Co., Inc., v. FCC*, 46 RR 2d 788, 790 (B/c Bur. 1979), *citing Continental Broadcasting Co. v. FCC*, 439 F.2d 580 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 905 (1971).

7. CBNC cites its previous compliance record as warranting mitigation. However, while CBNC accurately states that the Commission has never previously issued an NAL to the licensee, we note that on August 24, 1991, the Commission sent KMZQ-FM a letter of admonition for a violation of Section 73.1206 of the Commission's rules. Accordingly, we find that this previous violation disqualifies the station for a forfeiture reduction based on a good compliance record.

8. Finally, CBNC argues that the Commission's interpretation of the term "lottery" in 18 U.S.C. Section 1304 and Section 73.1211 of the Commission's Rules is improper because it applies a federal, rather than a state, standard. CBNC fails to provide any authority for this proposition, which runs counter to well-established practice. Furthermore, the intent of Congress on the applicability of Section 1304 to lotteries that are legal under state law was made clear in the legislative history of H.R. 3146, the

bill enacted as the "Charity Games Advertising Clarification Act of 1988," 18 U.S.C. Section 1307. In regard to this legislation, which provides certain exemptions to Section 1304, the Congressional Record states:

> The committee emphasizes that illegal gambling activities may not be advertised. In addition, the committee wishes to make it clear that no provision of H.R. 3146 is intended to change current law as it applies to interstate advertising of professional gambling activities.

CONG. REC. S16318 (daily ed. October 14, 1988). Thus, it appears that Congress intended federal law to take precedence with respect to casino gambling and that the law prohibits its advertisement.

9. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED that Commonwealth Broadcasting of Northern California, licensee of Radio Station KMZQ-FM, Henderson, Nevada, FORFEIT to the United States of America the sum of Twelve Thousand Five Hundred Dollars ($12,500) for the willful and repeated violation of 18 U.S.C. Section 1304 and Section 73.1211 of the Commission's Rules which occurred from April 30, 1991, until May 31, 1991. Payment of the forfeiture may be made by mailing to the Commission, a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTE

[1] *Commonwealth Broadcast of Northern California*, 7 FCC Rcd 4951 (MMB 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB Mobile Communications, Inc.
Tariff F.C.C. No. 1

Transmittal No. 13

ORDER

Adopted: December 17, 1992; Released: December 18, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On December 16, 1992, IDB Aero-Nautical Communications Inc., dba Mobile Communications (IDB) filed a request for extension of time to file its reply to the petition to reject IDB's Transmittal No. 13 filed by Communications Satellite Corporation (Comsat) on December 8, 1992.

2. IDB requests that the deadline for filing its reply be extended from Friday, December 18, 1992 until Wednesday December 23, 1992, because its Vice President and General Manager, who is most familiar with IDB Transmittal 13, is unavailable to assist in preparing the reply until the week of December 21. IDB also indicates that it has notified counsel for Comsat of its need for additional time, and Comsat has no objection to IDB's extension request. IDB Request at 1.

3. Section 1.45(a) of the Commission's Rules, 47 C.F.R. § 1.45(a) states that "oppositions to petitions may be filed within 10 days after the original pleading is filed." Good cause exists to grant IDB's motion to extend this time until December 23, 1992, as such action will not conflict with the purposes or policies underlying section 1.45. Moreover, it does not appear that COMSAT will in any way be prejudiced as a result of this decision.

4. Accordingly, IT IS ORDERED, that the request for extension of time to file a reply to COMSAT's petition to reject IDB Tariff F.C.C. No. 1, Transmittal No. 13, filed by IDB Mobile Communications, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-304

In the Matter of

Renewal Reporting Requirements for
Full Power, Commercial AM, FM and TV
Broadcast Stations

NOTICE OF PROPOSED RULE MAKING

Adopted: December 18, 1992; Released: December 30, 1992

Comment Date: February 23, 1993
Reply Comment Date: March 10, 1993

By the Commission:

I. INTRODUCTION

1. We are initiating this *Notice of Proposed Rule Making* on our own motion, to consider whether to require licensees of certain types of broadcast stations to report on their license renewal applications the status of their operations. Specifically, we propose to modify Form 303-S to require licensees of full power commercial AM, FM and TV stations to report whether, at the time of license renewal, their stations are on the air or have discontinued operations.

II. DISCUSSION

2. Section 73.1740(a)(4) of the Commission's Rules permits commercial AM, FM, and TV licensees to limit or discontinue operations for a period of 30 days without authority from the Commission. Licensees are required, however, to notify the Commission of limited or discontinued operations not later than the 10th day of such operation. The licensee is required to request additional time if station operations are not resumed within 30 days.[1] In addition, Section 73.1750 requires these commercial licensees to tender their license authorizations to the Commission for cancellation when discontinuance of station operations is permanent.

3. When a station has been authorized to remain silent and the Commission has not been notified that operations have resumed, the Commission inquires as to whether the station has returned to the air and, if not, what steps the licensee intends to take to restore broadcast operations. Thereupon, the Commission will determine whether further silence authority is warranted and what further action is appropriate, including cancellation of the station's license. Where this inquiry occurs at renewal time, action on the silent station's license renewal application is held in abeyance until broadcast operations are resumed or the matter is otherwise resolved.

4. Preliminary information gathered by the Commission indicates that commercial AM, FM, and TV stations may not be complying fully with the requirements of §§ 73.1740 and 73.1750. For example, the Commission is aware of an increasing number of commercial AM and FM stations (more than 200) that appear to have discontinued operations. Many of those stations did not notify the Commission of discontinued operations in a timely manner, and few that have permanently discontinued operations have tendered the license to the Commission for cancellation.

5. When a licensee discontinues operations for a long period of time, the public is harmed through diminished service. This harm is compounded when the licensee is unable or unwilling to restore service and permanently discontinues operations but does not provide that information to the Commission so that the frequency might be used by another party. Allowing such licensees to preserve their exclusive right to use the frequency precludes the provision of service to the public by another interested party that would resume station operations. It also hinders the Commission's maximum utilization of the electromagnetic spectrum in the public interest.

6. The Commission has historically regarded as paramount its role under the Communications Act to ensure that licensees broadcast in the public interest. The Communications Act specifically imposes on the Commission the responsibility to "determine, in the case of each application filed with it . . ., whether the public interest, convenience and necessity will be served by the granting of such application." 47 U.S.C. § 309(a). Unjustified prolonged suspension of station operations disserves the public interest, and the information which we propose to seek would promote the expeditious restoration of service to the public. Accordingly, we seek comment on our proposal to add to FCC Form 303-S the following questions:

> Is the station off the air as of the date of this filing?
>
> [ ] Yes [ ] No
>
> If yes, attach as Exhibit No. ___ a statement of explanation, including the steps the applicant intends to take to restore service to the public.

III. CONCLUSION

7. In light of the number of stations that appear to have discontinued operations, and in keeping with our policy of generally withholding action on renewal applications until after stations that are off the air have resumed operations, the Commission is initiating this proceeding to propose modification of Form 303-S in order to solicit information at renewal time as to the status of full power commercial AM, FM and TV broadcast operations.

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[1] Noncommercial educational AM, FM and TV stations, as well as FM and TV translator, LPTV and ITFS stations, are subject to different requirements, depending on the specific services involved. In light of differing treatment of these stations with regard to authority to discontinue operations, and in the absence of any indication of widespread discontinuance of operations by such stations, we are not proposing to modify the information required of licensees of these stations at renewal time.

IV. ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

8. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

9. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **February 23, 1993**, and reply comments on or before **March 10, 1993**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

10. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared the following Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981)).

11. **Reason for the Action:** The purpose of this *Notice* is to consider whether to solicit information at renewal time as to the status of licensees' broadcast operations.

12. **Objective of this Action:** This action is intended to determine whether soliciting such information would be in the public interest.

13. **Legal Basis:** Authority for the actions proposed in this *Notice* may be found in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303.

14. **Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule:** Licensees would be required to report as to the status of their broadcast operations at renewal time.

15. **Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule:** None.

16. **Description, Potential Impact and Number of Small Entities Involved:** Approximately 10,000 existing commercial broadcasters of all sizes would be affected by the proposals contained in this *Notice*.

17. **Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives:** None.

Additional Information

18. For additional information on this proceeding, contact David E. Horowitz, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

LAS AMERICAS COMMUNICATIONS, INC. Newark, New Jersey	**MM DOCKET NO. 84-115** File No. BPH-821105AR
FRANCES LAWRENCE ANTONIN AND MARY GARCIA d/b/a ANTONIN AND GARCIA Jersey City, New Jersey	**MM DOCKET NO. 84-123** File No. BPH-821108AQ
CAPRICE BROADCASTING GROUP, INC. Newark, New Jersey	**MM DOCKET NO. 84-125** File No. BPH-821108AS
COMSERVE BROADCAST GROUP, INC. Newark, New Jersey	**MM DOCKET NO. 84-128** File No. BPH-821108AV
MULTICULTURAL BROADCASTING, INC. Newark, New Jersey	**MM DOCKET NO. 84-131** File No. BPH-821108BE
OMNILINGUAL BROADCASTING, INC. Newark, New Jersey	**MM DOCKET NO. 84-137** File No. BPH-821108BK

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 1992; Released: December 30, 1992

By the Commission:

1. Before the Commission for consideration are petitions for reconsideration of a Commission Memorandum Opinion and Order affirming the ALJ's approval of a joint settlement agreement and the grant of the application of Multicultural Broadcasting, Inc., for a construction permit to replace Station WHBI's deleted facilities (currently operated on an interim basis with call letters WNWK) on Channel 290 at Newark, New Jersey. *Las Americas Communications, Inc.*, 7 FCC Rcd 2625 (1992).[1] In our decision we dismissed an application for review filed by the Committee to Preserve Multi-Ethnic and Multi-Lingual Programming (the Committee to Preserve) for lack of standing. We also denied a petition for leave to intervene filed by the Committee for Jersey City Radio and dismissed its opposition to the ALJ's approval of the joint settlement agreement and grant of Multicultural's application. For the reasons set forth below, we will deny the petitions for reconsideration.

I. Committee to Preserve

2. In support of its petition for reconsideration, the Committee to Preserve claims that the unique nature of the program format currently broadcast by Station WNKW (formerly WHBI) requires that any license issued in this proceeding must be conditioned on the preservation of this format. The petition raises essentially the same arguments contained in the Committee to Preserve's application for review. It is well established that the Commission does not grant reconsideration to debate matters on which the Commission has already deliberated and spoken. *See WWIZ, Inc.*, 37 FCC 685 (1965), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). Additionally, as the Committee to Preserve's petition for reconsideration does not rely on new or newly discovered matter, it will be summarily denied. 47 C.F.R. § 1.106(c).

II. Committee for Jersey City Radio

3. In its petition for reconsideration, the Committee for Jersey City Radio again asserts that it has standing and that the Commission can only approve the instant settlement agreement if Multicutural agrees to change its proposed city of license to Jersey City. Its petition will be denied for the following reasons. First, the Committee for Jersey City Radio's arguments supporting its standing to participate in this proceeding have already been considered and rejected in conjunction with its petition to intervene. Furthermore, although the Committee for Jersey City Radio submits that it has discovered new facts that require us to grant its petition, much of this information relates to matters that we have already found to be immaterial. *See* 7 FCC Rcd at 2626 ¶ ¶ 9-11. Thus, as to all of these contentions, no further discussion is warranted. See paragraph 2 above.

4. One item of purportedly "newly discovered evidence" warrants brief discussion. The Committee for Jersey City Radio reports that a lawsuit in the Federal District Court of the Southern District of New York, *Hong Kong Commercial Broadcasting Co., Ltd. vs. Sino Radio Broadcast Corporation, Arthur Liu, et al.*, Docket No. 91 Civ. 5150, alleges violations of the Federal Copyright Act, 17 U.S.C. § 101, *et seq.*, unfair competition arising under the Lanham Act, 15 U.S.C. § 1051, *et seq.*, and breach of contract. The Committee for Jersey City Radio submits that this pending

[1] The following pleadings are pending before the Commission: (a) Petition for Reconsideration filed May 27, 1992 by the Committee for Jersey City Radio; (b) Petition for Reconsideration filed May 28, 1992 by the Committee to Preserve Multi-Ethnic and Multi-Lingual Programming (the Committee to Preserve); (c) Mass Media Bureau's Consolidated Opposition to Petitions for Reconsideration filed June 10, 1992; (d) Opposition to Committee to Preserve's petition for reconsideration filed June 11, 1992 by Multicultural Broadcasting, Inc. (Multicultural); (e) Opposition to Committee for Jersey City Radio's petition for reconsideration filed June 11, 1992; (f) Erratum to opposition to Committee for Jersey City Radio's petition for reconsideration filed June 12, 1992 by Multicultural; (g) Reply to oppositions of Mass Media Bureau and Multicultural filed June 22, 1992 by the Committee for Jersey City Radio and (h) Reply to opposition of Multicultural filed July 8, 1992 by the Committee to Preserve.

litigation raises issues concerning Multicultural that require us to remand this proceeding to the ALJ for further hearing.[2] We disagree.

5. Contrary to the Committee for Jersey City Radio's characterization of this lawsuit as "newly discovered evidence," it would appear that this case was filed in 1991, prior to its petition to intervene. In any event, the Committee has not demonstrated that this information was not available at the time it filed its petition or provided an explanation for its failure learn of it prior to that time. Moreover, this civil litigation would not, in any event, justify remanding this proceeding for further hearings. The Committee for Jersey City Radio recognizes that it is the Commission's policy not to take cognizance of non-FCC misconduct unless it is adjudicated. Petition for Reconsideration at page 21 citing *Character Policy Statement*, 102 FCC 2d 1179, 1205 (1986). Multicultural notes that a settlement agreement was approved by the court on May 18, 1992. Therefore, there is no judgment of fault against Mr. Liu. Nonetheless, the Committee for Jersey City Radio argues that Multicultural's disregard for the law is so egregious that the Commission must remand this case for further hearing. This argument, based on supposition and conjecture, and relying on the mere filing of litigation that has since been terminated, is inadequate to warrant further Commission deliberations. In summary, the Committee for Jersey City Radio's petition for reconsideration does not provide any justifiable reasons for its consideration, and it warrants no further discussion here.

6. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 C.F.R. § 1.106, the Petitions for Reconsideration filed May 27, and May 28, 1992, respectively, by the Committee for Jersey City Radio and the Committee to Preserve Multi-Ethnic and Multi-Lingual Programming ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[2] The Committee for Jersey City Radio submits that the allegations of copyright infringement and unfair competition relate to Multicultural because Arthur Liu and his wife are the sole owners of both Sino Radio Broadcast Corporation and Multicultural.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Walter Communications, Inc. File No. 15636-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the E-group channel at Biloxi, Mississippi

ORDER ON RECONSIDERATION

Adopted: December 21, 1992; Released: December 30, 1992

By the Chief, Domestic Facilities Division:

1. This matter concerns a petition for reconsideration of the dismissal by the Domestic Facilities Division (the Division) of the application of Walter Communications (Walters) Inc., to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channel at Biloxi, Mississippi and for reinstatement of the application. For the reasons discussed below, we deny the petition.

I. BACKGROUND AND CONTENTIONS

2. As the result of a Commission lottery, held on July 28, 1986, Walters' application was selected for qualification review. Subsequently, the Division initiated a qualification review of the application pursuant to Section 21.32 of the Commission's Rules, 47 C.F.R. § 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Walters was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of the application would serve the public interest. By letter dated September 24, 1986, Walters was notified of these deficiencies[1] and provided an opportunity to cure them within thirty (30) days of the date of the letter.

3. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d) of the Commission's Rules, 47 C.F.R. §§ 21.13(c), 21.20(d), and 21.28(d) and by letter dated May 29, 1987, the Division dismissed, without prejudice, Walters' application for failure to comply in a timely manner with its request for information. This dismissal action appeared on public notice June 10, 1987.

4. On July 17, 1987, Walters submitted a petition for reconsideration of the Division's dismissal action. Walters maintains that reinstatement of the application would be in the public interest because it has substantially complied with the staff's request for information by curing most of the outstanding deficiencies.

II. DISCUSSION

5. Walters failed to respond in a timely manner to the Commission's initial request for information. Although Walters acknowledges that there was a delay in responding, it argues that it did not provide the information requested, within the specified time period, because it was heavily involved in the press of other business which made it difficult to cure its application. In addition, Walters also failed to file its petition for reconsideration in a timely manner. Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405 (1983), prescribes that petitions for reconsideration "must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of." Because the time period for filing petitions for reconsideration is prescribed by statute, the Commission may not ordinarily waive or extend the filing period. *Reuters Limited v. FCC*, 781 F.2d 946 (D.C. Cir. 1986) ("...we conclude that the Commission acted beyond it lawful authority when it entertained the belated petition for reconsideration."); *Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (1988); *Metromedia, Inc.*, 56 FCC 2d 909 (1975).[2] Due to Walters' failure to comply with this filing deadline, the petition for reconsideration is properly dismissed.

6. In view of the foregoing, dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement is not justified.

III. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Walter Communications, Inc., for its MMDS application at Biloxi, Mississippi IS DENIED.

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[1] The deficiencies cited were the absence of: (1) a signed lease or option to lease agreement, pursuant to 47 C.F.R. § 21.15(a); (2) current financial data, pursuant to 47 C.F.R. § 21.17(b); (3) a public interest statement, pursuant to 47 C.F.R. § 21.23(a)(4); (4) non-affiliation statement, pursuant to 47 C.F.R. §§ 21.900, 21.903(b)(1) and 21.903(b)(2); (5) system plan for local maintenance; (6) the answers to questions on FCC Form 435 pages 5, 6 and 7; and (7) an analysis demonstrating that the proposed facility will not cause any harmful interference to existing co-channel or adjacent channel ITFS receiver locations.

[2] There is a narrow exception to this reconsideration filing deadline when it has been demonstrated that there was an error in the Commission's notice. Gardner v. FCC, 530 F.2d 1086 (D.C. Cir. 1976); Amendments of Section 73, 202 (b), Table of Assignments, FM Broadcast Stations, 78 FCC 2d 1208 (1980); American Broadcasting Co., Inc., 86 FCC 2d 1 (1981). There has been no allegation of error in Commission notice with regard to this dismissal action. Thus, Walters does not qualify for treatment pursuant to this narrow exception.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Bell Operating Companies'

Provision of Information Services

MEMORANDUM OPINION AND ORDER

Adopted: December 15, 1992; Released: December 30, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 24, 1987, the National Telecommunications and Information Administration (NTIA) filed a petition seeking a declaratory ruling that the provision of information services by the Bell Operating Companies (BOCs) is in the public interest.[1] We here dismiss NTIA's petition without prejudice.

II. BACKGROUND

2. The Modification of Final Judgment (MFJ) divested the BOCs from AT&T and placed three major limitations on the post divestiture activities of the BOCs.[2] The MFJ prohibited the BOCs from: (a) offering information services; (b) providing interexchange services; or (c) manufacturing or providing telecommunications network equipment and manufacturing customer premises equipment. In its first triennial review of the MFJ, the U.S. District Court ruled that the MFJ restriction on BOC provision of content-based information services should remain in effect, but allowed the BOCs to transmit information "services generated by others and provide voice messaging services.[3] The BOCs and several other parties appealed the decision of the District Court, and the U.S. Court of Appeals reversed and remanded the issue of BOC provision of information services.[4] On July 25, 1991, the U.S. District Court issued a remand order lifting the MFJ restrictions on BOC ownership of content-based information services.[5] However, the U.S. District Court stayed the effect of the decision pending the outcome of appellate review.[6] On October 7, 1991, the U.S. Court of Appeals for the District of Columbia lifted the stay.[7]

III. PETITION

3. After the District Court's original ruling in the first triennial review, NTIA asked the Commission to rule that the public interest standard in the Communications Act of 1934 (Act) compels a finding that the BOCs must be authorized to provide information services. NTIA argues that the MFJ information services restriction represents a "cumbersome, unnecessary layer of regulation" that conflicts with the Act.[8] NTIA also asserts that BOC provision of information services is vital to the competitiveness of American business and is essential in providing American consumers with the full benefits of new technologies and services.

4. In its petition, NTIA argues that the court prohibition precluding BOC participation in information services is contrary to the Commission's congressional mandate to establish rules and regulations governing the provision of interstate communications services, and is responsible for placing important communications policy goals at risk. NTIA asserts that Title I of the Act requires the Commission to foster nationwide service and promote new technologies and services. Therefore, NTIA contends that the Commission is compelled to promote information services offered via the BOCs' local exchange networks. Furthermore, NTIA claims that BOC provision of information services would complement the Commission's Title II jurisdictional goals of promoting BOC network efficiency. Finally, NTIA states that any Commission public interest determination allowing BOC provision of information services would prevail over the MFJ restrictions.

IV. DISCUSSION

5. The information services market and the telecommunications industry have changed significantly since the NTIA petition was filed. Thus, the record in this proceeding has become stale. Furthermore, we note that, as discussed above, the District Court has lifted the MFJ restrictions on BOC provision of content-based information services, so that the BOCs can now provide all kinds of information services. Accordingly, NTIA's petition is dismissed without prejudice.

V. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED, the petition by the National Telecommunications and Information Administration IS HEREBY DISMISSED WITHOUT PREJUDICE.

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[1] Petition for Declaratory Ruling of the National Telecommunications and Information Administration, filed November 24, 1987.

[2] United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983) (MFJ).

[3] United States v. Western Electric Co., 673 F.Supp. 525 (D.D.C. 1987); United States v. Western Electric Co., 714 F.Supp. 1 (D.D.C. 1988); 767 F.Supp. 308 (D.D.C. 1991).

[4] United States v. Western Electric Co., 900 F.2d 283 (D.C. Cir.), *cert. denied sub nom.* MCI Communications Corp. v. United States, 111 S.Ct. 283 (1990).

[5] United States v. Western Electric Co., 767 F. Supp. 308 (D.D.C. 1991), *stay vacated*, U.S. v. Western Electric Co., 1991-1 Trade Cases (CCH) ¶ 69,610 (D.C. Cir. 1991).

[6] *Id.*

[7] United States v. Western Electric Co., 1991-1 Trade Cases (CCH) ¶ 69,610 (D.C. Cir. 1991).

[8] NTIA Petition for Declaratory Ruling (Petition) at iii.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-487

In re Applications of

GOODLETTSVILLE BROADCASTING COMPANY, INC.	File No. BPH-861215MI
SAR BROADCASTING, INC.	File No. BPH-861216MB
BLEDSOE COMMUNICATIONS, LTD.	File No. BPH-861216MD
HEIDELBERG-STONE BROADCASTING COMPANY	File No. BPH-861217MA
GOODLETTSVILLE COMMUNITY BROADCASTING, INC.	File No. BPH-861217MM
WILLIAM E. BENNS, III	File No. BPH-861217MQ
TENNESSEE WOMEN IN BROADCASTING, INC.	File No. BPH-861217MT
RICHARD S. FRANCIS	File No. BPH-861217NA

For Construction Permit for
New FM Station, Channel 246C2,
Goodlettsville, Tennessee

Appearances

Harry C. Martin, Esq., Matthew H. McCormick, Esq., and *Troy F. Tanner, Esq.*, on behalf of Goodlettsville Broadcasting Company, Inc.; *Stanley G. Emert, Jr., Esq.*, on behalf of SAR Broadcasting, Inc.; *C. Michael Norton, Esq.*, on behalf of Bledsoe Communications, Ltd.; *Timothy K. Brady, Esq.*, on behalf of Heidelberg-Stone Broadcasting Company; *Leonard S. Joyce, Esq.*, and *Shaun A. Maher, Esq.*, on behalf of Goodlettsville Community Broadcasting, Inc.; *Lauren A. Colby, Esq.*, on behalf of William E. Benns, III; *Samuel D. Lipshie, Esq.*, on behalf of Tennessee Women in Broadcasting, Inc.; and *Jeffrey S. Southmayd, Esq.*, on behalf of Richard S. Francis.

DECISION

Adopted: December 17, 1992; Released: December 31, 1992

By the Review Board: MARINO (Chairman) and GREENE. Board Member ESBENSEN absent.

Board Chairman MARINO:

1. The Review Board has before it the *Supplemental Initial Decision*, 7 FCC Rcd 2528 (1992) (*S.I.D.*), of Administrative Law Judge Joseph Chachkin (ALJ), granting the application of Heidelberg-Stone Broadcasting Company (HSBC) for the above-captioned facility, as well as the ALJ's earlier *Initial Decision* in this proceeding, 5 FCC Rcd 3965 (1990) (*I.D.*). Exceptions have been filed by all eight parties: Goodlettsville Broadcasting Company, Inc. (GBC), SAR Broadcasting, Inc. (SAR), Bledsoe Communications, Ltd. (BCL), Goodlettsville Community Broadcasting, Inc. (GCBI), William E. Benns, III (Benns), Tennessee Women In Broadcasting, Inc. (TWIB), Richard S. Francis (Francis), and HSBC. For the reasons set forth below, we concur with the ALJ's factual and legal analysis, and conclude that current Commission precedent supports his selection of HSBC as the comparatively superior applicant.

2. This case returns to the Review Board after a protracted and circuitous history. In the *I.D.*, the ALJ granted the now-defunct application of DG Enterprises, Inc. (DG). Exceptions were filed by all of the above applicants, as well as by DG and a second former applicant, Lindsey Christian Broadcasting Company (Lindsey). Thereafter, following unsuccessful efforts by the parties to settle the case, the Board certified the proceeding to the Commission because of a divergence of views and the absence of two votes for any result. *See Order*, 6 FCC Rcd 5651, released October 4, 1991. The Commission remanded the proceeding to the Board without addressing the merits of the case, however, reasoning that its immediate intervention was unnecessary because, effective October 1, 1991, it had appointed a fourth member to the Board, who would be eligible to sit in judgment on the case and break the deadlock after reviewing the record and reading the transcript of the oral argument on exceptions. *Order*, 6 FCC Rcd 6139 (1991).

3. The newly augmented panel was able to reach a decision and remanded the case to the ALJ on financial qualifications and related issues against DG and LCB. *Memorandum Opinion and Order*, 7 FCC Rcd 1833 (Rev. Bd. 1992). Thereupon, both applicants promptly sought, and were granted, voluntary dismissal of their applications, thus mooting the remand hearing. *Order*, FCC 92M-371, released March 25, 1992; *Order*, FCC 92M-467, released April 16, 1992. Preparation of an *S.I.D.* was required, nonetheless, in light of DG's dismissal, to choose a new comparative winner among the remaining viable applicants. In the latest round of exceptions, the applicants mainly incorporate by reference their prior exceptions, supplementing them to take into account the ALJ's grant of HSBC's application and recent significant legal developments, most notably, the post-*I.D.* opinion by the U.S. Court of Appeals for the District of Columbia Circuit invalidating the Commission's policy of awarding credit for female ownership in comparative hearings. *See Jerome Thomas Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992).

4. Our review of the pleadings reveals that the only issue currently outstanding in this proceeding is the standard comparative issue, which is governed by the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Policy Statement*), and subsequent modifications. The *Policy Statement* sets forth two primary objectives controlling the comparative analysis: (1) maximum diffusion of control of the media of mass communications, *i.e.*, "diversification"; and (2) best practicable service to the public, of which full-time participation in station operations by owners, *i.e.*, "integration," is deemed a factor of substantial importance. 1 FCC 2d at 394-395. Attributes of

participating principals provide further integration enhancement value. *Id.*, at 395-396. Employing these criteria and incorporating by reference his prior findings of fact from the *I.D.*, the ALJ concluded that there were two front-runners: HSBC and GBC. *S.I.D.*, para. 8. Both applicants received one hundred percent quantitative integration credit for proposing their full complement of voting owners in station management, enhanced qualitatively by service area residence-civic activities, broadcast experience, and, in the case of HSBC, fifty-one percent minority ownership. *Id.* GBC's lack of minority ownership tilted the scales in favor of HSBC. Neither was assessed a diversification demerit. Other criteria were not factors in the comparative reckoning.

5. Benns, GCBI, and Francis also received one hundred percent quantitative integration credit, but lagged clearly behind HSBC and GBC because of an absence of equally significant qualitative enhancements: Benns -- no local area residence-civic activities; GCBI -- nothing but past broadcast experience; and Francis -- minor service area residence. *Id.*, paras. 4, 5, 8. Benns also received a diversification demerit. TWIB was effectively eliminated from comparison with HSBC and GBC because it received a substantial diversification demerit. *See Bible Broadcasting Network, Inc.*, 7 FCC Rcd 4578, 4579 para. 7 (1992) (even a "slight diversification advantage is sufficient to outweigh a slight advantage for integration"). TWIB also received less than one hundred percent quantitative credit for its integration proposal. *I.D.*, para. 259. The final two applicants, SAR and BCL, were removed as realistic competitors after each received significantly less than one hundred percent qualitative integration credit. *Id.* , paras. 247, 250; *S.I.D.*, para. 4. *See Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5065-5066 paras. 17-18 (1989) (enhancement attributes considered only where there are no clear quantatitive integration differences among applicants) (subsequent history omitted).

6. Because we conclude that HSBC is entitled to the one hundred percent quantitative integration credit and enhancements awarded by the ALJ, and that the applicants with lesser qualitative enhancements, including GBC, cannot prevail in light of this disposition, we confine our main discussion to the exceptions relating to (1) the quantitative integration proposals of HSBC, SAR, and BCL, the latter two which also claim significant integration enhancements and would be comparatively competitive if their full quantitative proposals were credited; and (2) the qualitative differences between HSBC and GBC, the ALJ's front-runners. *See Colonial Communications, Inc.*, 6 FCC Rcd 2296 (1991) (only decisional exceptions need be addressed). We do not reach TWIB's exceptions concerning its application because they primarily focus on the constitutionality and appropriateness of the Commission's diversification policy, relief which TWIB's opponents correctly acknowledge is beyond the pale of the Board's delegated authority. *See Horne Industries, Inc.*, 91 FCC 2d 1193, 1194 (Rev. Bd. 1982) ("the Board has never been authorized to make 'new policy or change old policy'") (subsequent history omitted); *Isis Broadcast Group*, 7 FCC Rcd 5125, 5139 para. 44 (Rev. Bd. 1992) (Board noted challenge to diversification policy beyond its reviewing authority). *See also F.E.M. Ray, Inc.*, 7 FCC Rcd 4606 (1992) (rejected challenge to "continued use of the diversification criteria"). Our review of the ALJ's findings demonstrates that TWIB has a plethora of other broadcast interests, *see I.D.*, paras. 220-224, which justifies the ALJ's imposition of a diversification demerit for the reasons fully articulated in the 1965 *Policy Statement* and subsequent Commission decisions binding on this Review Board. *See Georgia Public Telecommunications Commission*, FCC 92-523, released December 9, 1992.

7. Neither, therefore, will we consider TWIB's exceptions concerning the constitutionality of the enhancements awarded to the other applicants, nor its suggestion to hold the case in abeyance until questions concerning the Commission's comparative evaluation process are resolved. Although *Bechtel v. FCC*, 957 F. 2d 873 (D.C. Cir. 1992) has precipated a reexamination of the comparative criteria, *see Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992), the Commission's response in *Anchor Broadcasting Limited Partnership*, 7 FCC Rcd 4566 (1992), enjoins us to apply the criteria of the *Policy Statement* unless and until modified as a result of the current inquiry. *See Gloria Bell Byrd*, FCC 92R-88 n.2 , adopted November 24, 1992. *But see Flagstaff Broadcasting Foundation v. FCC*, No. 90-1587 (D.C. Cir. December 4, 1992). Finally, we summarily deny, as contrary to well-settled Commission policy, a legal argument by GCBI that a bare pledge to relocate to Goodlettsville is equal or superior to past lengthy service area residence where there is no similar pledge to move to the community itself. *See Policy Statement*, 1 FCC 2d at 396; *see also Eugene Walton*, 7 FCC Rcd 3237, 3238 (1992) (service area residence entitled to greater weight than promise to move to community). We begin with the exceptions challenging the quantitative percentages awarded by the ALJ to SAR, BCL, and HSBC.

QUANTITATIVE EVALUATION

8. *SAR.* SAR is a Tennessee corporation comprised of three stockholders, Ronald E. Howse, Allen E. Williams, and Sandra Kennedy. *I.D.*, para. 38. Each owns thirty-three and one-third percent of the applicant and proposes to work full time at the station. *Id.*, paras. 38, 40, 47, 57. The ALJ held that SAR was not entitled to credit for Williams' thirty-three and one-third percent proposal because on the date integration proposals for this proceeding were due, *i.e.*, December 16, 1988, Williams simultaneously had pending a conflicting integration commitment in a separate Commission proceeding in which he was the sole general partner of an applicant for a new commercial television station at Newton, New Jersey. *Id.*, paras. 48-49. The SAR application reported that, in the event of a grant of Williams' Newton application, Williams would withdraw from SAR. *Id.* The incompatible commitments continued until the Commission denied the Newton applications for review on March 24, 1989 -- or more than three months after the integration proposals here had to be finalized. *Id.*, para. 49. In reducing SAR's credit, the ALJ relied upon Commission precedent denying such credit to proposals contingent on the deadline the applicants' comparative positions are frozen. *See generally Northland Communications*, 100 FCC 2d 914, 917 (Rev. Bd. 1985), *review denied*, 60 RR 2d 776 (1986), *aff'd by judgment sub nom. Up North Broadcasting Co. v. FCC*, 814 F. 2d 774 (D.C. Cir. 1987).

9. SAR contends that it should receive full integration credit, blaming the Commission for Williams' belated presence in the Newton proceeding. It argues that Williams' appeal in Newton was predicated on a claim that the other applicants there specified operating powers in excess of limits set forth by an agreement between the United States and Canada -- resulting in Williams' opponents receiving

comparative coverage preferences, and that Williams was not informed by the Commission until its final *Order* that the Canadian government had three years earlier consented to the use of higher power. SAR claims that Williams would not have continued to prosecute his application had he been aware there was no factual basis for the appeal, and it complains that Williams was deprived of procedural due process because "[i]t is totally unfair to charge Williams with knowledge of a fact that only the Commission and the Canadian government ever knew." (SAR Exceptions at 2-3). SAR alternatively argues there was no comparative upgrading here when it reported the Commission's *Newton Order* because the *Order* merely affirmed an ALJ *Initial Decision* and Review Board *Decision* released prior to the time integration proposals were due in the instant proceeding. SAR declares that prior to hearing in the direct case, and at the hearing itself, it showed there was no impediment precluding effectuation of Williams' Goodlettsville commitment.

10. SAR's arguments are unsound. In *Northland*, 60 RR 2d at 777 n.3, the Commission warned that integration proposals would not be credited if uncertain or indefinite on the date established by the ALJ for applicants to finalize their proposals. Here, the ALJ's *Order Prior to Prehearing Conference*, FCC 88M-4142, released December 5, 1988, directed each applicant to file its integration and diversification statement by December 16, 1988, identifying each integrated principal and stating whether such principals intend to withdraw from conflicting business or employment pursuits. It cautioned: "[f]ailure to so disclose will result in no integration credit being awarded such principals." *Order* at n.1. SAR, like all of the applicants in this proceeding, was on specific notice that the existence of an incompatible integration commitment on the deadline specified by the ALJ would result in a reduction of its overall quantitative integration credit, and it is of no avail that the conflict was subsequently removed after the deadline. *See Northland Communications*, 100 FCC 2d at 917 (contingency must be removed by the date specified by ALJ for integration statements and pledges) (subsequent history omitted); *Charisma Broadcasting Corp.*, 6 FCC Rcd 3411, 3413 para. 10 (Rev. Bd. 1991) ("if, at the time an integration credit pledge is made to the Commission, an extrinsic contingency could vitiate that pledge, credit will not be awarded"). *See also Daytona Broadcasting Co. Inc.*, 97 FCC 2d 212, 216 (Rev. Bd. 1984) ("comparative licensing proceedings conducted under the *Policy Statement* are far too exhaustive and expensive to allow an applicant to be drawn deeply into a competition for the license, only to be confronted by a competitor whose comparative position has been improved" after the date established for finalizing integration proposals) (subsequent history omitted).

11. Moreover, SAR's attempt to shift the responsibility for its delinquency upon the Commission is belied by the record. The winning Newton applicant prevailed because of its clearly superior integration proposal. *See Newton Television Limited*, 4 FCC Rcd 2561, 2561-2562 (1989). The Canadian letter was not decisional and, indeed, the arguments objecting to the Commission's taking of official notice of Canadian consent for the winner's site were eventually mooted on reconsideration because of the subsequent unavailability of that site. *See* 5 FCC Rcd 2755, 2758 n.5 (1990). In any event, as one of SAR's competitors points out, Williams' appeal in *Newton* was based upon a reaffirmation of his pledge to be integrated full-time, and that "his extensive broadcast experience in both television and radio would be enhancing factors, which coupled with his pledge to move to Newton, New Jersey, and his minority status, would make his application the clear winner." *See* GBC Reply at 17. Although fully crediting Williams' proposal, the Commission found that his application was not otherwise comparatively superior. *See* 4 FCC Rcd at 2562. In light of the above, the record firmly supports the ALJ's conclusion that SAR is not entitled to integration credit for Williams' proposal, thus eliminating any need to discuss this applicant further.

12. *BCL.* BCL purports to be a Tennessee limited partnership, comprised of one general partner, Ronald L. Bledsoe, and two limited partners, C. Michael Norton and Charles W. Bone. *I.D.*, paras. 68-69. BCL seeks one hundred percent quantatitive integration credit based on Bledsoe's commitment to work full time at the station. The ALJ partially rejected BCL's claim, diminishing the credit to seventy-five percent -- an amount equal to Bledsoe's equity interest -- after including the twenty-five percent non-integrated ownership of the limited partners to the integration calculus. *I.D.*, para. 250. He found that Norton and Bone, both of whom are attorneys, performed legal services for BCL -- including initiating the application and representing BCL throughout the hearing process -- and, thus, contravened the no material involvement standards required to exempt the interests of passive owners from attibution. *Id.*, para. 251. He further found that the interests of the limited partners were attributable because BCL's limited partnership agreement omitted the requisite safeguards identified by the Commission in *Ownership Attribution*, 58 RR 2d 604, 618-620 (1985), as necessary to show adequate insulation of the limited partners from the management of the media-related activities of the partnership. *I.D.*, para. 250. BCL attempted to introduce into evidence a curative amendment to its agreement on May 30, 1989, but the the amendment was rejected as impermissible upgrading. *Id.*, para. 76.

13. BCL contends in its exceptions that it is fundamentally unfair for the ALJ retroactively to apply to it either the prohibition against limited partners providing legal services or the insulation standards from the Commission's 1985 *Ownership Attribution*, because both standards, it asserts, were not explicitly made applicable to integration criteria in comparative hearings until June 1, 1988, in *Mark L. Wodlinger*, 3 FCC Rcd 3139 (Rev. Bd. 1988) -- well beyond the date for filing amendments as of right in this proceeding. BCL argues that the prohibition against involvement by limited partners in prosecuting an application should take effect only after the applicant receives a Commission license, and here, Bledsoe testified that BCL would no longer utilize the legal services of its limited partners if and when its application were granted. It also adverts to its efforts to file the curative amendment concerning the insulation requirements, arguing that the amendment rejection was erroneous.

14. The exceptions are denied. It is well established that the equity interests of limited partners performing legal services for an applicant are included in the applicant's integration evaluation. *See Doylan Forney*, 3 FCC Rcd 6330, 6332 paras. 11-12 (Rev. Bd. 1988), *review denied*, 5 FCC Rcd 5423 (1990) (subsequent history omitted). The Commission aptly observed in its *Clarification of Attribution Reconsideration Order*, 1 FCC Rcd 802 (1986):

> A partner whose contribution to the partnership is in the form of personal services and expertise rather than in the form of a financial investment is the antithesis of a passsive investor. Indeed, it is virtually inevitable that'such a partner will become actively involved in partnership affair.

1 FCC Rcd at 804 para.16. The argument that such inclusion constitutes a retroactive application of a subsequent change of policy was previously rejected in *Doylan Forney*, which, like here, involved applications filed prior to the Commission pronouncements in *Ownership Attribution, Clarification of Ownership Attribution*, or *Mark L. Wodlinger*. *See* 5 FCC Rcd at 5423 paras. 3-4. The Commission in *Doylan Forney* declared:

> [We held] in *Anax* [87 FCC 2d 483 (1981)] that the interests of limited partners are not relevant to integration credit if the limited partners are merely passive investors without power to control the applicant. Conversely, the interests of nominally "limited" partners who, in fact, are not mere passive investors must be factored into the integration analysis. The analysis in *Attribution* and the later reconsideration of that report are consistent with the *Anax* standard. *See Magdalene Gunden*, 3 FCC 2d 7186, 7186 para. 6 (1988), *recon. denied*, 5 FCC Rcd 2509 (1990). Nothing that the Commission said in *Attr ibution* has changed the basic principle of *Anax;* only purely passive interests are exempt from attribution in comparative cases.

5 FCC Rcd at 5423 para. 4, *aff'd by judgment sub nom. Maricopa Media, Inc. v. FCC*, 951 F.2d 1324 (D.C. Cir. 1991) ("[*Clarification of Ownership Attribution*] ... did not establish any 'rule' with respect to legal services; rather, it merely declined to carve out an exemption for legal services from the general policy prohibiting limited partners from providing any services relating to their partnerships' broadcast activities.") *See also Payne Communications, Inc.*, 1 FCC Rcd 1052, 1055 para. 18 (Rev. Bd. 1986) ("express articulation of [insulation threshold in *Attribution*] merely illuminated the basic standard adumbrated in *Anax*"), *modified in other respects sub nom. Evergreen Broadcasting Co.*, 6 FCC Rcd 5599 (1991), *recon. denied*, FCC 92-449, released October 14, 1992. *Doylan Forney* and the other authorities cited above are controlling here. With respect to the ALJ's second basis for diminishing BCL's quantitative proposal, even if the partnership agreement had met the Commission's insulation standards or BCL had shown that the original document met the *Anax* standards, provision of the legal services on behalf of the applicant by Norton and Bone is sufficient to support the ALJ's diminution of BCL's quantitative integration proposal.

15. *HSBC*. HSBC is a general partnership consisting of two partners, John H. Heidelberg and Katherine A. Stone. *I.D.*, para. 88. Heidelberg has a fifty-one percent interest in the applicant and proposes to serve as the facility's general manager while Stone, the forty-nine percent owner, intends to work as the business manager and public relations director. *Id.*, paras. 88, 89, 95. Both will work full time. *Id.*, 89, 95. Heidelberg, who is currently employed as assistant production manager at Station WSM(AM/FM), Nashville, Tennessee, originally filed the petition for rulemaking in 1983, which led to the allocation of the Goodlettsville channel, but testified that he eventually needed a partner to obtain the necessary funding for constructing and operating the station. *Id.*, para. 96. He therefore was introduced to Stone by a fellow employee at the station, and entered into negotiations with her after she expressed interest in the enterprise. *Id.*, paras. 96-97. Stone, a widow, had managed a day care center for a short time prior to her husband's death in 1986, and was then unemployed. *Id.*, para. 96. She received her ownership interest in the applicant in return for agreeing to provide the requisite funding. *Id.*, para. 97. The applicant subsequently obtained a bank commitment letter secured by Stone's certificate of deposit, but Stone's personal loan commitment is still available if needed. *Id.*, para. 98; Tr. 866-868. Heidelberg and Stone have split prosecution costs proportionate to their partnership interests. *Id.*, para. 98. In addition to Heidelberg's employment at Station WSM, he sells newspaper subscriptions at night over the telephone; he will terminate his employment in the event HSBC's application is granted. *Id.*, para. 90. The ALJ credited HSBC's proposal, stating that no evidence had been introduced raising questions as to the ability or willingness of the principals to carry out the integration pledges, and that attacks on the proposal were unsupported by the record and based on impermissible speculation and surmise. *Id.*, para. 253.

16. The opposing parties object to the ALJ's award of full quantitative credit to HSBC. GBC and GCBI, for example, contend that HSBC is entitled to no more than fifty-one percent quantitative credit. Specifically, GBC claims that Stone will not occupy a policy-making or managerial role at the station, basing its claim on Stone's lack of experience and Heidelberg's admission that he probably would have continued to prosecute the application alone had he been able to obtain the necessary financing by himself. GBC Exceptions at 20-21, citing Tr. 884. Additionally, GBC and GCBI assert that Stone has been too passive during the application process to merit credit. GBC notes, for example, that, although Stone had agreed to defray forty-nine percent of the prosecution expenses, Heidelberg in fact had contributed the bulk of financing until shortly before the hearing. In contrast to the positions taken by GBC and GCBI, SAR argues that because of Stone's financial dominance, it is unlikely that Heidelberg will exercise any true managerial independence over the applicant. SAR would diminish HSBC's credit below Stone's forty-nine percent interest, however, because Stone obligated herself to provide funding in return for a mere forty-nine percent interest in the applicant, which proposal, SAR finds incredulous. Francis would further discount HSBC's proposal based on Heidelberg's deposition testimony concerning the circumstances surrounding his initial meeting with Stone, which Francis characterizes as evasive, citing to Tr. 834.

17. The ALJ correctly rejected the arguments challenging HSBC's full integration proposal as speculative. It is well settled that integration credit will be awarded where "the applicant sets forth a specific integration proposal; the applicant adheres to that proposal; and there is reasonable assurance that the plan will be carried out." *Royce International Broadcasting*, 5 FCC Rcd 7063 para. 7 (1990) (subsequent history omitted); *see also Bradley, Hand & Triplett*, 89 FCC 2d 657 (Rev. Bd. 1969). Here, the parties have presented no legally cognizable arguments for undermining HSBC's claims. Stone proposes to work as business manager and public relations director, both positions that are recognized as managerial entitled to integration credit, *see Policy Statement*, 1 FCC 2d at 395; *Opportunity Broadcasting*

of Shreveport, 7 FCC Rcd 3382, 3385 para. 16 (Rev. Bd. 1992); and a lack of current employment or insignificant past work experience has never provided a sufficient basis, absent other indicia, for rejecting an integration proposal. *See generally Swan Broadcasting Limited*, 6 FCC Rcd 17, 19-20 para. 14 (Rev.Bd. 1991); *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 951 (Rev. Bd. 1982) (even lack of broadcast experience not equated with an inability to effectuate an integration proposal because it could discourage qualified newcomers and confers only an initial advantage). Heidelberg's elicited digressions regarding his intentions had he been able to secure financing without assistance are not probative or even pertinent to Stone's role here, since Heidelberg did not, in fact, obtain such financing. He specifically advised Stone that she would be required to work in management of the station if she joined the applicant, and she agreed to become an integrated principal. Tr. 888, 891-892, 942. No evidence has been adduced that she can not or will not honor her pledge, and conjecture is not a legal basis for discounting an applicant's integration proposal. *See Cleveland Television Corp. v. FCC*, 732 F.2d 962, 969 (D.C. Cir. 1984) ("mere suspicion" no basis for disregarding an applicant's ownership structure).

18. Furthermore, although some of HSBC's opponents assert that Stone was too passive to receive credit, it appears that they confined their cross-examination at hearing to other matters and failed to question Stone regarding her involvement, or lack thereof, in the applicant. Her written exhibit reflects that her duties will include supervision of all phases of the station's business and financial affairs and that station employees in these areas of station operations will report to her. HSBC Exh. 3. HSBC's opponents cannot now attempt "to draw adverse conclusions out of thin air." HSBC Reply Br. at 15. *See also National Communications Industries*, 6 FCC Rcd 1978, 1982 para. 23 (Rev. Bd. 1991) (evidence "not contradicted ... or on its face incredible ... entitled to carry the day in terms of establishing the point to which it was directed") (subsequent history omitted). Certainly, the argument that Heidelberg initially paid the bulk of the prosecution expenses is inconsequential; he testified at hearing that Stone has paid her forty-nine percent share of the prosecution costs. Tr. 882, 900-901.

19. Finally, SAR's starkly contrasting contention that Heidelberg will not exercise independence over the station's management because of Stone's financial contribution is rejected. Heidelberg has been significantly involved in securing a Goodlettsville station since his rulemaking proposal filed in 1983. Similarly, SAR's speculations as to the credibility of HSBC's proposal in light of Stone's "mere" forty-nine percent equity interest, are in vain, *see Cleveland, supra,* and its cryptic reference, based on Tr. 830, that Heidelberg will not resign his secondary employment is contrary to the record, *see* HSBC Exh. 2. Francis' candor allegations relating to Heidelberg's deposition testimony are without merit. Heidelberg testified at hearing that, at his deposition, he could not remember the precise circumstances of meeting with Stone, and that it was only after speaking with her following the deposition, and inquiring about the matter, that he was able to refresh his memory concerning the event. Tr. 834-835. We affirm the ALJ's judgement about this matter.

QUALITATIVE EVALUATION

20. As noted in para. 6, above, we have not reached the exceptions relating to whether GBC is entitled to one hundred percent quantitative integration because, as shown below, it can not prevail on enhancements even if that proposal is credited. GBC is a Tennessee corporation with the following shareholders: Eleanor Mead, Donna H. Smith, D. Whitson Adamson, Carolyn Jackson, and Dorothy L. Sheppard. *I.D.*, para. 3. Each of GBC's shareholders holds a twenty percent equity interest in the applicant and all propose to be integrated into management positions on a full-time basis. *Id.*, paras. 3, 4, 11, 18, 24, 30. Adamson will serve as general manager. *Id.*, para. 30. The ALJ enhanced GBC's integration proposal by one hundred percent long-term service area residence, a modicum of civic activities, and twenty percent broadcast experience credit for Adamson, who worked at station WSMV-TV, Nashville, for fifteen years. *S.I.D.*, para. 6. HSBC, in turn, received fifty-one percent long-term and forty-nine percent short-term service area residence credit, minor civic credit, fifty-one percent minority ownership, and fifty-one percent broadcast experience for Heidelberg. *Id.*, para. 7. Heidelberg's broadcast experience extends back to 1969 and includes positions as staff announcer, music director, and program director. *I.D.*, para. 92. The ALJ concluded that, although GBC's local residence is narrowly superior to that of HSBC's -- one hundred percent long-term versus fifty-one percent long-term, forty-nine percent short-term -- that advantage "is tempered by the unimpressive record of civic activities of most of" GBC's principals, and is ultimately outweighed by HSBC's fifty-one percent minority preference. *S.I.D.*, para. 8. GBC asks us to strengthen its comparative position by emphasizing its civic activities and diminishing the difference in past broadcast experience, calling it a "wash." Suppl. Exceptions at 10 n.5.

21. In choosing between applicants that have equal quantitative proposals, the Commission looks to the enhancements or qualitative attributes of the participating owners. These enhancements include local residence-civic participation, minority ownership, and broadcast experience. *See Miracle Strip*, 4 FCC Rcd at 5065 para. 11; *Ronald Sorenson*, 6 FCC Rcd 1952, 1952-1953 (1991) (civic activities are to be considered with local residence as a unified factor). Although local residence and minority ownership are fundamental considerations in the qualitative analysis and receive the greatest weight, each having "equal significance," *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985), local residence can be outweighed by residence associated with civic participation even if the residence is long-term. *See Ronald Sorenson*, 6 FCC Rcd at 1952-1953 (principal with fifteen years residence and extensive community involvement awarded substantial residence enhancement preference over life-long resident with miminal civic activities). Past broadcast experience is deemed of minor significance since it confers only an initial advantage. *Policy Statement*, 1 FCC 2d at 396.

22. Here, we perceive no factual or legal basis for overturning the ALJ's analysis. As he correctly found, GBC does hold an edge on the unified local residence-civic activities factor. All of its principals are long-term residents with some civically involved whereas Stone moved within the Goodlettsville service area only one year prior to the HSBC application filing, *I.D.*, at para. 100; *S.I.D.* para. 7, and her civic activities consist of singing for various civic and community organizations. *Id.*, at para. 93, 102; *S.I.D.* para. 7. Heidelberg has lived in the service area since 1968,

residing in Goodlettsville since 1987, *I.D.*, at para. 91; *S.I.D.* para. 91, and been civically involved since 1973. *I.D.*, para. 93. Only Mead and Smith for GBC, however, were found by the ALJ to have more than minimal civic activities, and even there, the bulk of Mead's leadership activities occurred after GBC's application had been filed. Such post-filing activities are entitled to only minor weight. *See Eugene Walton*, 7 FCC Rcd 3237, 3238 para. 12 (1992).

23. On balance, we, like the ALJ, conclude that HSBC's fifty-one percent minority ownership enhancement, coupled with HSBC's own lengthy local residence (for Heidelberg) and minor civic activities, is sufficient to narrowly outweigh GBC's local residence advantage. *See, e.g., Lorraine Walker Arms*, 6 FCC Rcd 5586, 5588 para. 10 (Rev. Bd. 1991) (credit received for minority ownership prevails over small preferences for residence, civic activities, and broadcast experience). HSBC's edge is widened by the additional preference for proposing a fifty-one percent owner with past broadcast experience -- Heidelberg -- to GBC's twenty percent owner, Adamson. Heidelberg has also worked significantly longer than Adamson and held various managerial positions. GBC's reliance on *Frank Digesu*, 7 FCC Rcd 837 (Rev. Bd. 1992), *remanded on other grounds*, 7 FCC Rcd 5459 (1992), and *Opportunity Broadcasting of Shreveport*, 7 FCC Rcd 3382 (Rev. Bd. 1992), for a contrary result, is misplaced. *Digesu* involved a pre-*Lamprecht* applicant that prevailed on the basis of female ownership and superior broadcast experience after the applicant's substantially superior unified local residence-civic activities had been offset by its opponent's minority status. 7 FCC Rcd at 841 ¶ 17. Here, even if GBC's forty-nine percent advantage on long-term residence (one hundred percent minus fifty-one percent) and less civic were equivalent to HSBC's fifty-one percent minority advantage, HSBC would still prevail because of its broadcast experience advantage. In *Opportunity*, the prevailing applicant possessed superior quantitative local residence and superior civic activities along with far better broadcast experience; its opponent had the advantage only in minority ownership, sixty percent versus twenty percent, which was not enough to overcome the winner's other advantages. 7 FCC Rcd at 3384 ¶ 12. GBC's less substantial residence-civic advantage does not offset HSBC's minority ownership and broadcast experience advantages and residence-civic credit.

24. *Miscellanous*. By *Memorandum Opinion and Order*, FCC 89M-2830, released December 26, 1989, the ALJ denied a motion to reopen the record and enlarge the issues filed by Benns, seeking an undisclosed principal issue against HSBC. Benns argued that H.C."Cal" Young, Jr., the principal of Young Broadcasting, Inc., a former applicant for the Goodlettsville frequency, was an undisclosed party to the application of HSBC. The ALJ ruled that Benns had failed to make a *prima facie* showing of any undisclosed arrangements between the HSBC principals and Young. Benns excepts to the ruling, but limits his brief to a recitation of facts rather than objecting to the ALJ's analysis. We have fully reviewed the allegations and the ruling and conclude for the reasons set forth in the ALJ's *Order* that Benns failed to meet his burden of establishing a *prima facie* case for an issue. *See Sumter Radio, Partners*, 7 FCC Rcd 2573, 2576 n.8 (Rev. Bd. 1992).

25. ACCORDINGLY, IT IS ORDERED, That the motion to strike, filed August 21, 1990, by Heidelberg-Stone Broadcasting Company IS DENIED; that its petition for leave to file supplement and to exceed page limitation, filed August 22, 1990, IS GRANTED; and that the petition for leave to amend, filed April 18, 1991, by William E. Benns, III, IS GRANTED, and the amendment IS ACCEPTED; and,

26. IT IS FURTHER ORDERED, That the application of Heidelberg-Stone Broadcasting Company (File No. BPH-861217MA) for a construction permit for a new FM station at Goodlettsville, Tennessee IS GRANTED; and that the applications of Goodlettsville Broadcasting Company, Inc. (File No. BPH-861215MI), SAR Broadcasting, Inc. (File No. BPH-861216MB), Bledsoe Communications, Ltd. (File No. BPH-861216MD), Goodlettsville Community Broadcasting, Inc. (File No. BPH-861217MM), William E. Benns, III (File No. BPH-861217MQ), Tennessee Women In Broadcasting, Inc. (File No. BPH-861217MT), and Richard S. Francis (File No. BPH-861217NA) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-309

In the matter of

Inquiry into Policies
to be Followed in the
Authorization of Common
Carrier Facilities to Provide
Telecommunications Service off
the Island of Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 1992; Released: December 31, 1992

By the Commission:

I. INTRODUCTION

A. Summary

1. We have received five petitions seeking reconsideration[1] of the *Puerto Rico Order*[2] in which the Commission found that the domestic and international Puerto Rico off-island markets should be opened to competition and that PRTC should be allowed to enter these markets subject to certain conditions designed to ensure fair competition. In this Order, we affirm the Commission's prior decisions in this proceeding. We also clarify the requirements concerning the provision of customer proprietary network information (CPNI) by PRTC and provide an alternative method to meet these requirements.

B. Background

2. PRTC currently provides most of the intra-island local exchange and toll service in Puerto Rico.[3] Service between Puerto Rico and off-island points historically has been provided almost exclusively by AT&T-PR,[4] although several interexchange carriers (IXCs) have provided off-island service on a resale basis.[5]

3. This proceeding was instituted to consider issues related to competitive entry into the Puerto Rico off-island markets.[6] The *Puerto Rico Order* concluded that: (1) competition in the domestic and international off-island markets is feasible and would promote the public interest; (2) the public convenience and necessity would be furthered by the introduction of direct telecommunications service between Puerto Rico and additional off-island points; (3) PRTC should be allowed to enter the off-island domestic and international markets as a dominant carrier subject to a number of conditions designed to ensure fair competition, including nonstructural safeguards; (4) action on international satellite earth station applications filed by AT&T and PRTC as well as related demand issues should be deferred to separate Commission orders; and (5) action on PRTC's and ITT World Communications, Inc.'s (ITT) applications to provide direct services to and from Canada should also be deferred to separate orders.

4. In conjunction with its conclusion that the public interest would be served by allowing PRTC to enter off-island markets, the Commission established a number of requirements concerning the provision of interim access to multiple carriers, and the expeditious implementation of full equal access comparable to that provided on the mainland. In particular, the Commission required that PRTC: (1) provide AT&T-PR, the traditional off-island carrier, with interim access arrangements at least as desirable as that carrier's current access; (2) provide other authorized off-island carriers with interim access equal to that of PRTC's off-island interexchange operations; (3) interconnect other off-island carriers' switches located on the island with the island network; and (4) implement full mainland type Feature Group (FGD) equal access service by the end of 1989.[7] The Commission also found that its rules classify PRTC as a dominant carrier in the provision of off-island domestic service and that PRTC should be treated under the Commission's rules as dominant for the provision of

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[1] Puerto Rico Telephone Company (PRTC), MCI Telecommunications, Inc. (MCI), General Comserv Corporation (Comserv), and A-Plus Information Processing Company (APIP) and Call U.S. filed petitions for reconsideration. PRTC subsequently filed a Withdrawal of Petition for Reconsideration on March 15, 1989. Parties filing oppositions and replies are listed in Appendix A.

[2] Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico, CC Docket No. 86-309, 2 FCC Rcd 6600 (1987) (*Puerto Rico Order*).

[3] PRTC is a government-owned local exchange and intra-island toll carrier. It provides approximately ninety percent of Puerto Rico's intra-island telephone service. The remaining ten percent of intra-island telephone service is provided by the Puerto Rico Communications Authority (PRCA), renamed the Puerto Rico Communications Corporation, which is also owned by the Commonwealth of Puerto Rico (Commonwealth). The Commonwealth does not permit intra-island competition. Puerto Rico Reply to Petitions at 6 n.4.

[4] In 1987, AT&T acquired the common stock and facilities of All America Cables and Radio, Inc. (AACR) and renamed it AT&T-PR. *See* AT&T Acquisition of ITT Communications Services, Inc. Subsidiaries, 2 FCC Rcd 3948 (Com. Car. Bur. 1987), *appeal dismissed*, Case No. 87-1291 (D.C. Cir. Mar. 10, 1988). The Commonwealth of Puerto Rico also filed an Application for Review with this Commission of the Common Carrier Bureau's decision to authorize the acquisition; the Application was subsequently withdrawn. *See* File No. ENF 87-07, Contingent Withdrawal of Application for Review filed by Puerto Rico on August 16, 1988, and letter from Gregory J. Vogt to Jonathan D. Blake (October 17, 1988).

[5] Some of the carriers that previously served the off-island market as resale carriers include MCI and CALL U.S.

[6] Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico, CC Docket No. 86-309, Notice of Proposed Rulemaking, 104 FCC 2d 1275 (1986). The Commission had previously authorized PRTC entry in the off-island markets, but these orders were vacated by the Court of Appeals for the District of Columbia Circuit and remanded to the Commission for further proceedings. *See infra* para. 41.

[7] PRTC's comments had stated that PRTC intended to implement such access at that time.

international message toll service (IMTS). In addition, the Commission concluded that network information and CPNI disclosure requirements similar to those for the BOCs and AT&T should be applied to PRTC.

5. In response to the *Puerto Rico Order*, several parties petitioned for reconsideration. MCI, CALL U.S., and Comserv seek reconsideration of the requirement that all off-island carriers pay premium access charges for interim access. Comserv further asks us to reopen the record to receive information on the "implementation tactics" of PRTC, and asks that we impose "policies consistent with the mainland." In particular, Comserv objects to the prohibition of intra-island competition and the implementation of non-premium interim access. CALL U.S. asks further that this Commission adopt measures for the protection of small interexchange resale carriers. Finally, APIP asks us to rescind our decision to permit PRTC's entry into the domestic and international off-island markets on the ground that the Commission acted improperly by instituting a post-remand rulemaking proceeding without court approval. APIP also alleges that the actual record supporting competitive entry is inadequate.

6. After the close of the pleading cycle on reconsideration, AT&T, PRTC, and the Commonwealth of Puerto Rico reached agreement on a comprehensive settlement of numerous regulatory disputes pending before the Commission. As part of the settlement, PRTC substituted Telefonica Larga Distancia de Puerto Rico (TLD), a subsidiary of the Puerto Rico Telephone Authority (PRTA),[8] for itself as the applicant for off-island facilities authorizations and licenses.[9] PRTA filed a Petition for Declaratory Ruling that TLD qualifies for non-dominant regulatory treatment in the provision of both domestic and international off-island services.[10] The Common Carrier Bureau (Bureau) subsequently adopted two orders that authorized TLD to enter the Puerto Rico off-island domestic and international interexchange markets on a non-dominant basis. One of these Bureau orders found TLD non-dominant in the provision of domestic and international off-island service.[11] A companion order granted a Section 214 application filed by TLD for international off-island service citing data on traffic growth for Puerto Rico and the public interest finding in the *Puerto Rico Order*.[12] The *Section 214 Order* found that the public interest would be served by TLD's construction and operation of an earth station at Humacao, Puerto Rico. That order also stated that since TLD is non-dominant in the provision of domestic service it need not file a Section 214 application to provide domestic off-island telecommunications services.[13]

7. PRTC subsequently sought a waiver of the December 31, 1989, equal access conversion deadline. As reasons for the extension, PRTC cited problems and delays in the various activities required to reconfigure and modernize its network for equal access, replace its electromechanical end offices with digital end offices, convert digital end offices that had non-standard signalling systems, and convert its network to the North American Dialing Plan.[14] The Bureau found that PRTC had shown good cause for a limited waiver, and granted PRTC an extension through September 30, 1990, for equal access conversion.[15] The Bureau also waived the existing equal access presubscription balloting requirements to the extent necessary to permit the use of PRTC's timeline for presubscription balloting. That Order also required PRTC to provide AT&T and any other off-island carrier with the service they requested for use in providing their own operator services no later than September 30, 1990.[16]

8. On March 30, 1990, PRTC announced that it was implementing equal access conversion in Puerto Rico. Shortly thereafter, PRTC filed a request for an extension of

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[8] Both TLD and PRTC are wholly-owned subsidiaries of PRTA, a public authority of the Commonwealth of Puerto Rico.

[9] Puerto Rico Telephone Company Application for Authority to Construct and Operate an International Communications Satellite Earth Station in Humacao, Puerto Rico, FCC File No. CSG-85-048-P, filed August 24, 1988.

[10] Puerto Rico Telephone Authority Petition for Declaratory Ruling, August 19, 1988 (*PRTA Petition for Declaratory Ruling*). The PRTA petition stated that TLD would be a separate corporation with separate books of account and separate switching and transmission facilities, and that TLD would not provide intra-island service.

[11] Puerto Rico Telephone Authority Petition for Declaratory Ruling, 3 FCC Rcd 5675 (Com. Car. Bur. 1988) (*Non-dominant Order*). Although TLD is not structurally separate as defined by *Second Computer Inquiry* standards (*i.e.*, fully separated personnel and marketing staffs), it has stated that it will maintain separation in accordance with the guidelines established in the *Fifth Report and Order* in the *Competitive Carrier* proceeding. Based on this representation, TLD was found non-dominant for domestic service. TLD was also found non-dominant for international off-island service because it was separated from PRTC in accordance with the *Fifth Report and Order*, did not control bottleneck facilities, and faced competition in the off-island Puerto Rico market. As the Commission discussed in the *Puerto Rico Order*, however, if PRTC provided domestic off-island service on a fully integrated basis, it would be treated as dominant for the provision of this service because its interexchange operations would not be sufficiently separate from its local exchange carrier (LEC) operations to qualify for forbearance in accordance with the *Fifth Report and Order* in the *Competitive Carrier* proceeding. 98 FCC 2d 1191, 1198 (1984); *Puerto Rico Order*, 2 FCC Rcd at 6611, paras. 65-66. In addition, because PRTC controls bottleneck facilities, the *Puerto Rico Order* requires dominant carrier regulation of PRTC, consistent with the *International Competitive Carrier* proceeding, if PRTC provides international off-island service on a fully integrated basis. 102 FCC 2d 812, 832 (1985); *Puerto Rico Order*, 2 FCC Rcd at 6611, paras. 65-66.

[12] La Telefonica Larga Distancia de Puerto Rico, Memorandum Opinion, Order and Authorization, 3 FCC Rd 5937 (Com. Car. Bur. 1988) (*Section 214 Order*).

[13] *Id.* at 5938, para. 10.

[14] PRTC Petition for Declaratory Ruling Or, In the Alternative, Waiver, July 14, 1989.

[15] Puerto Rico Telephone Company Equal Access Conversion Schedule, 5 FCC Rcd 118 (1989) (*PRTC Equal Access Waiver Order*). In that Order, the Bureau denied PRTC's Petition for Declaratory Ruling seeking a ruling that since PRTC no longer intended to provide off-island service directly, it was no longer required to implement FGD equal access in Puerto Rico by December 31, 1989. The Bureau observed, in part, that the Bureau orders granting TLD non-dominant status and a Section 214 Authorization to provide off-island service had required that PRTC comply with the requirements established in the *Puerto Rico Order* even though off-island service would be provided by TLD. *Id.* at 119, para. 10.

[16] *PRTC Equal Access Waiver Order*, 5 FCC Rcd at 118, para. 1. The Bureau granted a similar waiver of the presubscription balloting rules for PRCA to implement equal access conversion "contemporaneously" with PRTC, 'at the latest, early in the fourth quarter of 1990.' *See* Puerto Rico Communications Authority Equal Access Conversion Schedule, 5 FCC Rcd 2521 (1990) (*PRCA Waiver Order*).

the equal access conversion date to December 31, 1990, stating that PRTC would not be able to complete equal access conversion for all end offices by September 30, 1990.[17] PRTC stated that several recent developments had caused delays. Among the delaying factors PRTC cited were the planned "privatization" of PRTC, threats of substantial labor unrest, unexpected delays in repairing the damage from Hurricane Hugo, the expansion of equal access to include public telephones and cellular telephones, and the off-island carriers' request for additional time to review PRTC's Equal Access Guide. As part of that filing, PRTC provided a detailed schedule of proposed conversion dates for "clusters" of end offices throughout Puerto Rico by December 31, 1990. The Bureau found that PRTC had shown good cause for a limited waiver, and granted PRTC an extension through December 31, 1990, for equal access conversion. That Order also required PRTC to provide AT&T and any other off-island carrier with the service they request for use in providing their own operator services no later than December 31, 1990.[18] PRTC completed equal access conversion on December 21, 1990.[19]

9. In February 1992, TLD filed several applications for transfer of authority to provide off-island telecommunication services associated with the partial sale of TLD by PRTA.[20] We will not address these transfer applications in this proceeding.[21]

II. RECONSIDERATION ISSUES

10. Despite the settlement resolving several of the pending regulatory disputes between AT&T, PRTC, and the Commonwealth of Puerto Rico, many of the issues raised in the petitions for reconsideration still require resolution. We have grouped the issues into the following categories: (1) PRTC market entry; (2) rates for interim access; (3) nonstructural safeguards; (4) interim access procedures; and (5) Commission procedures. Each of these issues is discussed separately below.

A. PRTC Market Entry

1. Background

11. The Commission has found that competitive entry into the domestic and international off-island markets is feasible and will serve the public interest.[22] The *Puerto Rico Order* stated that Puerto Rico was within the geographic scope of the Commission's pro-entry policy established in the *MTS and WATS Market Structure* proceeding, and the Commission relied on the findings in that proceeding in concluding that competition in the domestic off-island market would benefit the public. The Commission stated, however, that to the extent the *MTS and WATS Market Structure* proceeding could be deemed not to encompass Puerto Rico, competitive entry into the off-island markets was independently justified on the basis of the MTS traffic and revenue data for service between the mainland and Puerto Rico,[23] and the well-established benefits associated with interexchange service competition on the mainland.[24]

12. The *Puerto Rico Order* also found that competitive entry in the international off-island market was feasible based on the growth in traffic for that market. Furthermore, it found that competitive entry in the international off-island market would benefit the public. In support of this conclusion, the Order cited the Commission's prior findings that, where feasible, competition will result in: (1) the provision of telecommunications service at the lowest possible cost; (2) a reduction in the waste of resources; (3) increased responsiveness by carriers to the needs and desires of consumers; and (4) more rapid and efficient responses by carriers to technical change and innovation. Moreover, the Order concluded that new entrants would not burden ratepayers with excessive facility costs, since they would only acquire as much capacity as demand warranted. The Commission also found that the public would benefit from route diversity ensuing from competition.[25]

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[17] PRTC, Request for Extension of Time, April 6, 1990 (*PRTC Extension Request*).

[18] Puerto Rico Telephone Company Equal Access Conversion Schedule, 5 FCC Rcd 5830 (1990) (*PRTC Equal Access Further Waiver Order*). The Bureau also granted PRCA a waiver to implement equal access with PRTC by December 31, 1990.

[19] Letter from Paul J. Berman to Richard Firestone, FCC, dated January 11, 1991.

[20] TLD and LD Acquisition Corporation (the "new" TLD) have filed a Section 214 application for authority to transfer from the present TLD to the new TLD authority to provide international services, to acquire and operate facilities and to amend the Submarine Cable Landing License for the Transcaribbean Cable System. (File No. ITC-116) In addition, TLD has filed for authority to assign its international satellite earth station permit and its international fixed public point-to-point telegraph and telephone station license to Telecomunicaciones Ultramarinas de Puerto Rico (TUPR) (File No. CSG-92-067-AL and File No. C4-92-001-AL). TUPR has applied to provide international and interstate private line service between Puerto Rico and numerous other countries. (File No. ITC-92-121). LD Acquisition Corporation is a Puerto Rico Corporation owned primarily by a subsidiary of Telefonica de Espana (79 percent), the telephone company serving the nation of Spain, and partly owned by PRTA (19 percent). Telecomunicaciones Ultramarinas de Puerto Rico is a new entity controlled by PRTA which is owned by the government of Puerto Rico.

[21] As with all Commission requirements, the requirements of the *Puerto Rico Order* and this order apply to PRTC until they are removed.

[22] *Puerto Rico Order*, 2 FCC Rcd at 6600, para. 3.

[23] The data on traffic to and from Puerto Rico showed that domestic MTS minutes had increased at an average annual compound rate of 16.9 percent between 1980 and 1985, and that revenues had increased at an average annual compound rate of 11.3 percent during the same period. *Puerto Rico Order*, 2 FCC Rcd at 6604, para. 31.

[24] MTS and WATS Market Structure, Report and Third Supplemental Notice of Inquiry and Proposed Rule Making, CC Docket No. 78-72, 81 FCC 2d 177 (1980). Several Commission decisions, in addition to the *MTS and WATS Market Structure* proceeding, have allowed competitive entry into the domestic markets. *See* MCI, 18 FCC 2d 953 (1969), *recon., denied*, 21 FCC 2d 190 (1970); Specialized Common Carrier Services, 29 FCC 2d 870 (1971), *recon.*, 31 FCC 2d 1106 (1971), *aff'd sub nom.* Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975); Domestic Satellite Facilities, 35 FCC 2d 844 (1972), *recon.*, 38 FCC 2d 665 (1972).

[25] *Puerto Rico Order*, 2 FCC Rcd at 6605, para. 34. As previously discussed, the Bureau approved TLD's Section 214 application for international off-island service, relying on the conclusions reached in this proceeding concerning competitive entry, and stated that TLD was free to enter the domestic

2. Positions of the Parties

13. CALL U.S., Comserv, and APIP oppose the Commission's decision to allow PRTC to enter the off-island service markets. CALL U.S. and Comserv argue that PRTC should not be allowed to enter these markets unless it allows intra-island competition.[26] CALL U.S. contends that this requirement is necessary to reduce the cost of intra-island calling and improve service. Comserv argues that PRTC's authority should be conditioned on consistency with mainland policies because PRTC is a monopoly carrier without state regulatory review. In addition, APIP strongly opposes PRTC's entry into the off-island markets, and contends that a sufficient factual record has not been developed regarding the public interest benefits of competitive entry to support allowing PRTC's entry into the off-island markets.[27] Although AT&T supports the Commission's decision to allow competitive entry in the off-island markets, it argues that the Commission must establish conditions sufficient to ensure that PRTC cannot cross-subsidize its off-island operations or act in an anticompetitive fashion.

14. PRTC argues that these contentions should not be considered because none of these parties filed comments opposing PRTC entry into the off-island markets in response to the *Notice*. PRTC also challenges APIP's contention that the record does not support a conclusion that competition is beneficial.[28] PRTC states that the Commission examined traffic growth in the domestic and international off-island service markets, and reviewed the results of interexchange competition on the mainland before determining that off-island competition is feasible and in the public interest. PRTC opposes the request that the intra-island market be opened to competition, and argues that this is an issue internal to Puerto Rico that has previously been litigated. PRTC further argues that this Commission is prohibited from requiring intra-island service resale or competition as a precondition to PRTC's entry into the off-island markets.[29]

3. Discussion

15. We reaffirm the conclusion that competitive entry in the Puerto Rico off-island domestic and international markets is feasible and in the public interest. We view the Commission's open entry decision in the *MTS and WATS Market Structure* proceeding as including the Puerto Rico domestic off-island market, although we find that competitive entry in this market is independently justified by the record in this proceeding and our experience observing the benefits of interstate competition on the mainland. Both domestic and international off-island traffic has grown substantially in recent years, and is more than sufficient to support competitive entry. The Commission's policy of open entry in the interstate market has brought increased customer choice and lower prices, and we believe that competitive entry in the Puerto Rico off-island markets will produce similar results.

16. None of the parties commenting in response to the *Notice* in this proceeding provides any information that challenges the prospective benefits of competitive entry in the Puerto Rico off-island markets. Contrary to APIP's contentions, we believe that the Commission's open entry decision in CC Docket No. 78-72, the current record, and our experience with interexchange competition amply justify the decision to allow competitive entry in both the domestic and international off-island markets.[30] Similarly, the comments filed by Comserv and CALL U.S. provide no basis for changing the Commission's decision in favor of competitive entry. We also decline to adopt the tardy suggestion that we condition PRTC's entry into the interexchange market on its taking actions to permit intra-island competition. Any such condition would be an unwarranted intrusion upon the Commonwealth's discretion to establish competitive policies for telecommunications services between points within the Commonwealth. *See* 47 U.S.C. §§ 152 (b) and 153 (g) (matters involving intrastate communications are generally outside the FCC's jurisdiction).

B. Rates for Interim Access

1. Background

17. In the *MTS and WATS Market Structure* proceeding, the Commission determined that the LECs must provide the other common carriers (OCCs) with a 55 percent discount in the rates for use of non-premium access in mainland exchanges that have not been converted to equal access. The *Puerto Rico Order* concluded that this discount was established "in a context altogether different from that before us in the case of Puerto Rico."[31] It further concluded that the differences that existed on the mainland between the premium and non-premium access services were far greater than the differences between premium and non-premium interim access in Puerto Rico, and that AT&T-PR's interim "overall advantage [in Puerto Rico] is not sufficient to warrant a differential in access charges."[32] The Commission reached this conclusion because it did not find the differences in Puerto Rico interim access for AT&T-PR -- fewer access digits for AT&T-PR customers and an advantage in obtaining operator-handled or assisted traffic -- to be sufficient to warrant a differential in access charges. Thus, the Commission required that AT&T-PR, the premium carrier, and all other off-island carriers, including PRTC (or in this instance, TLD), pay the full premium access charges for interim access.

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off-island market as a non-dominant carrier without further regulatory action. *Section 214 Order*, 3 FCC Rcd at 5938, para. 10, n.6.

[26] CALL U.S. Petition at 3; Comserv Petition at 1-2. APIP argues that PRTC's unwillingness to allow intra-island competition is an attempt to abuse its monopoly position and an example of anticompetitive behavior. APIP Opposition at 7.

[27] APIP Opposition at 5.

[28] *See Puerto Rico Order*, 2 FCC Rcd at 6605, paras. 33-34.

[29] PRTC Reply to Petitions at 6, n.4.

[30] APIP claims that the Commission has not reconciled its pro-entry decision with the fact that PRTC previously argued that competition in the off-island market was not feasible. APIP asserts that, in light of PRTC's previous arguments, the record in this proceeding will not support PRTC's market entry. APIP Petition at 19. The Commission reached its conclusion that competition is feasible and publicly beneficial based on the full record in this proceeding, a review of traffic statistics on the Puerto Rico off-island markets, and the Commission's previous findings on the benefits of competition. PRTC's earlier opinion on the feasibility of competition in off-island services, which is different from the position it holds today, in no way undermines these conclusions.

[31] *Puerto Rico Order*, 2 FCC Rcd at 6609, para. 54.

[32] *Id.* at 6609, para. 55.

2. Positions of the Parties

18. MCI, Comserv, and CALL U.S. petitioned for reconsideration of the Commission's requirement that PRTC charge the same access rates for both premium and non-premium interim access.[33] PRTC argues that a discount is warranted based on the differences in the two forms of interim access.[34] PRTC also argues that the discount is needed to enable off-island competition to develop.[35]

19. CALL U.S. and Comserv argue that they should not have to pay premium access charges for inferior Feature Group B (FGB) access that does not include ANI[36] or ADS.[37] CALL U.S. also states that FGB access on the mainland has been billed at non-premium access rates despite the fact that it includes the ANI and ADS features. CALL U.S. also asks us to bar the provision of interim FGB access until ANI and ADS are available.[38] Comserv argues that it should not be required to pay premium access charges, but contends that PRTC should pay the higher charges because of its dominant position in the provision of local exchange service, its control of access facilities, and the fact that it has user information immediately available.[39] Moreover, Comserv states that under interim access, IXCs will have to pay PRTC for billing or pay for delayed billing information.[40]

20. MCI asks us to reconsider the Commission's decision to require PRTC to charge premium rates for non-premium interim access.[41] It contends that decision is inconsistent with our treatment of FGA and B on the mainland.[42] In support of this discount request, MCI states that the interim access available to the IXCs other than AT&T-PR is inferior to premium interim access.[43] MCI states that it will be unable to carry traffic from Puerto Rico to overseas locations when the customer must dial more than 10 digits. It estimates that this limitation could decrease the number of international calls available for it to carry by approximately seven percent.[44] Moreover, MCI states that competitive carriers will not be able to provide operator-assisted calls from Puerto Rico. Thus, MCI concludes that application of full premium rates for interim access will adversely affect MCI and the other IXCs in their efforts to compete with AT&T-PR.

21. AT&T supports the Commission's conclusion in the *Puerto Rico Order* that the difference between three-digit and five-digit access does not warrant a discount, noting that AT&T will have not one, but five, three-digit codes for interim access.[45] In addition, AT&T contends that the facts that justified a discount on the mainland are not present in the case of Puerto Rico.[46] In particular, AT&T argues that PRTC should not be allowed to obtain interim access at discounted rates, because PRTC is a government-owned company, will have ANI and ADS, is one of the largest local exchange carriers in the country, and is well known to telecommunications users in Puerto Rico. Finally, AT&T contends that application of premium access rates to the interim access PRTC receives will encourage PRTC to implement equal access as soon as practicable. AT&T does not comment on whether a discount for other competitive off-island carriers such as MCI, CALL U.S., and Comserv is appropriate.

3. Discussion

22. Historically, the Commission has permitted discounts on access charges when there were significant differences between the premium and discounted services, if necessary to promote an overriding policy objective. In the *Puerto Rico Order*, the Commission declined to establish a discount for interim access PRTC provides to other IXCs in Puerto Rico. That Order concluded that a discount was not appropriate because AT&T's overall access advantage was not sufficient to warrant a differential in access charges, and because the Commission's policy providing a discount to other IXCs on the mainland was established in a context

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[33] *See* MCI Petition at 3; Comserv Petition, Attachment 2 at 5; Call U.S. Petition at 2. On May 23, 1990, MCI requested that we accept late-filed comments that include "information obtained through actual experience since 1988." (hereafter MCI Comments.) We accept MCI's late filed comments because we believe we should consider MCI's comments regarding its experience with interim access.

[34] PRTC argues that "the guiding principle in this area has been that non-similar access services should be subject to different rates." PRTC Reply to Petitions at 3. PRTC also argues that in recent decisions, the Commission has stated that qualitative differences in access justify different rates. PRTC cites Abbreviated Dialing Arrangement and the Application of Premium Access Charges, CC Docket No. 78-72, Phase III, 2 FCC Rcd 6758 (1987); In re: Interim 800 Exchange Access Tariffs, CC Docket No. 86-279, 60 RR 2d 1090, 1091, n.3 (1986). Puerto Rico Reply to Petitions at 3-4.

[35] PRTC Reply to Petitions at 3-4.

[36] ANI provides the billed party telephone number to the IXC.

[37] ADS provides the IXC with information on whether the call was completed and disconnected, as well as information on the length of the call.

[38] Call U.S. Petition at 5.

[39] Comserv argues that PRCA should also pay premium access charges because it has these same characteristics. Comserv Petition, Attachment 2, at 2. PRTC responds, however, that PRCA has not applied to provide off-island services. PRTC Reply to Oppositions at 3 n.7

[40] Comserv Petition, Attachment 2, at 3.

[41] MCI notes that the Bureau has approved discounted non-premium access in other situations *citing* NECA Revision to Tariff FCC No. 5, 3 FCC Rcd 5791 (Com. Car. Bur. 1988), and Illinois Consolidated Telephone Company Petition for Waiver of Part 69 Regarding Abbreviated Dialing Arrangements, 5 FCC Rcd 2742 (1990). MCI states that the extension of the equal access conversion date in Puerto Rico "by almost one year" has proven to be especially costly for MCI because of it has been charged premium access "while receiving inferior service." MCI Comments at 3-4.

[42] MCI Petition at 3. However, MCI urges us to allow the initiation of the interim structure outlined in the *Puerto Rico Order* while we investigate the appropriate discount level for PRTC non-premium interim access. *Id.* at 5-6.

[43] *Id.* at 4. MCI argues that the post dial delay "created by inferior access" has caused customer confusion resulting in customers hanging up or blaming the IXC. MCI Comments at 5.

[44] MCI Petition at 5. MCI states that because of "inferior access" carriers are unable to provide full international service to approximately twenty percent of Puerto Rico customers. MCI Comments at 5.

[45] AT&T argues that the two extra digits that other off-island carriers must dial only adds 1/4 second to the dialing time and that with touch-tone dialing, speed dialing and automatic dialing, the argument that this additional time supports an access charge discount is "frivolous." AT&T Opposition at 14, note **. PRTC counters that 85 percent of the telephone lines in Puerto Rico are equipped for rotary dialing. PRTC Reply to Oppositions at 6.

[46] AT&T Opposition at 15.

altogether different from that before us in Puerto Rico.[47] No party has convinced us that we should reconsider the decision not to establish a discount.

23. The differences between premium and non-premium access on the mainland are far greater than differences between premium and non-premium access in Puerto Rico.[48] The *Access Charge Reconsideration Order* stated that on the mainland, AT&T received several features unavailable to other IXCs using the predominant form of access at the time, Feature Group A.[49] AT&T's customers dialed ten to eleven digits whereas the customers of the other IXCs dialed twenty-two to twenty-three digits. Because of the availability of these features to AT&T and other points of differentiation between the two forms of access, the Commission found that AT&T's premium interconnection was clearly more valuable than that offered to the other IXCs.[50]

24. The differences between the two forms of interim access in Puerto Rico are far less significant. Pre-equal-access telecommunications equipment in Puerto Rico differed from that on the mainland. The service received by AT&T-PR as FGC access in Puerto Rico and the FGB interim access available to other IXCs differed significantly from the pre-equal-access FGC and FGB access AT&T and other IXCs have received on the mainland.

25. The principal difference in access in Puerto Rico for International Direct Distance Dialing (IDDD) calls and direct distance dialing to points within the North American Numbering Plan (DDD) calls was that AT&T-PR customers dialed five three digit access codes, a different code for each of five types of off-island calls, where other IXCs' customers dialed one five digit code for IDDD calls, and another five digit code for DDD calls. It is not clear that AT&T derives any significant advantage by having its customers dial one of five three-digit codes, rather than one of two five-digit codes. Certainly, this difference is far less significant than the difference between the twenty-two or twenty-three numbers dialed by customers of other IXCs on the mainland, and the ten to eleven numbers dialed by AT&T's customers. Before equal access was implemented, AT&T-PR also handled operator assisted or operator handled traffic unless a customer dialed a special seven digit Feature Group A access code to route the call to another IXC. Finally, international calls requiring that users dial more than ten digits were carried by AT&T-PR.[51] The *Puerto Rico Order* found that these differences did not justify a discount for other IXCs,[52] and parties here have not persuaded us to revise that finding.

26. On the mainland, the primary justification for a discount was that it would foster the development of interexchange competition.[53] On the mainland, IXCs other than AT&T had already paid substantially lower rates for their access to the total exchange network as early as 1979, five years before the final 55% discount for non-premium access was established in 1984. The Commission concluded continuation of a discount was necessary to the continued development of interexchange competition on the mainland.

27. Moreover, while equal access conversion on the mainland is still not complete, equal access has been fully implemented in Puerto Rico approximately three years after approval of interim access. Given the limited use of pre-existing FGA discounted service,[54] much smaller differences between the types of access received by AT&T and the other IXCs, and the shorter time period before the full implementation of equal access in Puerto Rico, the Commission properly concluded that a discount was not necessary to promote interexchange competition.[55] Indeed, the growth of competition in Puerto Rico is evidenced by the number of other IXCs that participated in the equal access presubscription balloting process in Puerto Rico. Ten carriers, including AT&T and TLD, participated. IXCs other than AT&T captured a substantial portion of the customers for off-island interexchange telecommunications service.[56]

28. Accordingly, for the several reasons we detail above, we affirm the decision in the *Puerto Rico Order* to require other IXCs to pay premium charges for interim access in Puerto Rico.[57]

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[47] *Puerto Rico Order*, 2 FCC Rcd at 6609, paras. 54-5. *See* MTS and WATS Market Structure, Third Report and Order, 93 FCC 2d 241 (1983) (*Access Charge Order); modified on reconsideration*, 97 FCC 2d 682 (1983) (*Access Charge Reconsideration); modified on further reconsideration*, 97 FCC 2d 834 (1984)(*Access Charge Second Reconsideration); aff'd in principal part and remanded in part*, National Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095(D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1224, 1225 (1985); *modified on further reconsideration*, 49 Red. Reg. 46,383 (1984), 101 FCC 2d 1222 (1985)(*Access Charge Third Reconsideration); aff'd on further reconsideration*, 102 FCC 2d 849 (1985) (*Access Charge Fourth Reconsideration).*

[48] *Id.* 2 FCC Rcd at 6609, para. 55.

[49] That Order identified such features as: (1) trunk side, four-wire connection to local switches; (2) transmission of traffic through fewer local switches; (3) ADS; and (4) ANI. 97 FCC 2d at 726, paras. 101-102; *Access Charge Second Reconsideration*, 97 FCC 2d 834, 859 (1984), *affirmed sub nom.*, American Tel. & Tel. Co. v. FCC, 832 F. 2d 1285 (D.C. Cir. 1987).

[50] *Access Charge Order*, 93 FCC 2d 241, 286 (1983).

[51] *Puerto Rico Order*, 2 FCC Rcd at 6608, para. 45.

[52] Moreover, it concluded that requiring PRTC (or its off-island affiliate) to pay premium rates for non-premium access would have the public benefit of encouraging PRTC to implement equal access throughout the island as soon as practical. *Puerto Rico Order*, at 6609, para. 55.

[53] *Access Charge Reconsideration*, 97 FCC 2d at 728. *Access Charge Second Reconsideration Order*, 97 FCC 2d at 861; *Third Reconsideration Order*, 101 FCC 2d at 1229.

[54] Pre-interim access, FGA access was available through PRTC, but because of various characteristics of the Puerto Rico telecommunications market, was little used. Exchange Carrier Association, Inc. Tariff F.C.C. No. 1 Transmittal No. 220, released June 30, 1987, at n.2. *See also* PRTC Opposition to Petitions for Rejection of Proposed Tariff Revisions, Transmittal No. 220, filed April 27, 1987, at 8.

[55] In the *Puerto Rico Order*, we found that PRTC's interim access would provide a largely acceptable framework for competition during the interim period. 2 FCC Rcd at 6608, para. 50.

[56] Carriers included TLD, AT&T, MCI, CALL U.S. Worldcomo, Puerto Rico Telecomo, U.S. Sprint, Conserv Telecomo, National Telephone, and STSJ Overseas Telephone. Carriers other than AT&T obtained 54% of the residential presubscription ballots, and 74% of the commercial presubscription ballots in the first round of presubscription balloting for equal access in Puerto Rico. Letter from Paul Berman, to Richard Firestone, FCC, dated September 4, 1990, at Attachments.

[57] Parties cite to orders by the Commission and Common

C. Nonstructural Safeguards

1. Background

29. The *Puerto Rico Order* required PRTC to comply with a number of nonstructural safeguards in order to ensure fair competition. That Order imposed network information and CPNI disclosure requirements upon PRTC similar to the requirements the Commission had imposed on AT&T and the BOCs.[58] It required that PRTC develop a CPNI plan that: (1) makes PRTC customers' CPNI available to competing off-island carriers if the customer so requests; (2) establishes procedures to prevent disclosure of customer CPNI to PRTC (now TLD) personnel involved in the provision of off-island service; (3) establishes procedures to inform multi-line business customers of PRTC's CPNI obligations; and (4) provides competing IXCs with aggregate non-proprietary CPNI data on the same terms and conditions that such data are made available to PRTC's (now TLD's) off-island operations. The *Puerto Rico Order* also required that PRTC obtain our approval of its CPNI plan prior to entering the off-island markets.

30. In addition, the *Puerto Rico Order* required PRTC to comply with certain network information disclosure requirements. Accordingly, PRTC must: (1) notify all authorized off-island carriers when new or modified network configurations or services are under development; (2) disclose these developments at the "make/buy" point; and (3) disclose technical network information and market information to the public 12 months prior to the introduction of the new or modified network configuration or service.[59] Finally, the *Puerto Rico Order* required PRTC to make available to off-island carriers information for each end office or wire center on the past and projected number of business and residence telephone lines, as well as the average usage per line. This information must be updated by PRTC at least semi-annually and offered to PRTC's (now TLD's) off-island operations and other carriers at the same price.

2. Discussion

31. Although the PRTC reconsideration petition, which requested changes in the CPNI requirements, has been withdrawn, the *Section 214 Order* made TLD's authorization contingent upon full compliance with CPNI requirements established in this Order. We have accordingly reexamined the CPNI requirements in light of TLD's entry.

32. As a consequence of the provision of off-island service by TLD in place of integrated provision of off-island service by PRTC, as originally proposed, we have decided to modify the Commission's CPNI requirements. Accordingly, PRTC may satisfy the Commission's CPNI requirements in either of two ways. As set forth in the *Puerto Rico Order*, PRTC can comply with the CPNI requirements that apply to the BOCs. Alternatively, PRTC can treat TLD in exactly the same manner that it treats other off-island IXCs, *i.e.*, withholding all individual CPNI unless disclosure is authorized by the customer. Thus, under the latter approach, CPNI must be released to all off-island carriers including TLD on the same terms and conditions. If, however, PRTC wants to make CPNI information more readily available to TLD, then it must comply with the requirements established in the *Puerto Rico Order*.[60]

33. Within 60 days of the release of this Order, PRTC must notify us of the CPNI alternative it has selected. If PRTC has decided not to adopt a "prior authorization" approach for TLD, it must submit a revised CPNI plan at this time as well. The PRTC CPNI Plan should conform to the changes, clarifications and implementing requirements we established for the BOCs.[61] We instruct the Bureau to issue a public notice establishing a 30 day comment and 15 day reply comment cycle on PRTC's submittal. We delegate to the Chief, Common Carrier Bureau the authority to review and approve or disapprove PRTC's submittal. Whichever alternative PRTC selects, we reaffirm the Commission's decision in the *Puerto Rico Order* that, for purposes of this proceeding, CPNI does not include information concerning off-island services used by customers. We also reaffirm that: (1) PRTC should ensure that information about other off-island carriers' customers is not made available to PRTC (or TLD) off-island personnel; and (2) each off-island carrier including PRTC (or TLD) will be able to obtain from PRTC full information about the off-island services that the off-island carrier provides to its customers.[62]

34. We agree with AT&T's contention that the IXCs must receive network disclosure information on a timely basis in order to interconnect with the island network and compete

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Carrier Bureau approving discounts for access services that provide some of the features of equal access as justifying a discount for non-premium interim access in Puerto Rico. *See supra* n.34 & 41. The basis for a discount on which these orders rely does not apply in the Puerto Rico context. As discussed above, the Commission required in the *MTS-WATS* proceeding that access services providing less than full equal access be provided at a discount to other IXCs. In this proceeding, we have not found that for Puerto Rico the different forms of access have had significant effects on competition, the principal reason for the discount for disparate access service on the mainland. In addition, we find that there was not a significant difference between the access service provided by PRTC to AT&T and to the other IXCs. Thus, the orders cited by parties do not require that we grant a discount for interim access service provided by PRTC to other IXCs in Puerto Rico.

[58] *Puerto Rico Order*, 2 FCC Rcd at 6611, para. 67.

[59] For a discussion of the network disclosure requirements, see the *Puerto Rico Order*, 2 FCC Rcd at 6611-6612, para. 68, n.94-97.

[60] *Id.* 6612, para. 69.

[61] For clarifications and implementing requirements, see Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2 Phase I, 4 FCC Rcd 1, 209-234 (1988) (*BOC ONA Order*), *modified on reconsideration*, 5 FCC Rcd 3084 (1990) (*BOC ONA Reconsideration Order*); 5 FCC Rcd 3103 (1990) (*BOC ONAAmendment Order*), *Erratum*, 5 FCC Rcd at 4045, *pets. for recon. pending, pets. for rev. pending*, California v. FCC, No. 90-70336 (9th Cir. filed July 5, 1990); 6 FCC Rcd 7646 (1991) (*BOC ONA Further Amendment Order, pet. for review pending*, MCI Telecommunications Corp. v. FCC, No. 92-70189 (9th Cir. filed Feb. 19, 1992). In the *BOC Safeguards Order*, the Commission required the BOCs to obtain authorization to access the CPNI of customers with more than 20 lines. *See Computer III* Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991), *pets for recon. pending, pets. for rev. pending*, California v. FCC, No. 92-70083 (9th Cir. filed Feb. 14, 1992).

[62] *Puerto Rico Order*, 2 FCC Rcd at 6612, para. 69, n.98. AT&T-PR contends that PRTC has failed to provide it with basic billing data for AT&T-PR services. The Commission's order detariffing billing and collection services requires all LECs to continue to make "recording" services available to IXCs

for off-island traffic.[63] As the Commission concluded in the *Puerto Rico Order*, these requirements will foster the development of a competitive market and reduce the potential for future regulatory conflicts among the participants in the off-island markets. Thus, we reaffirm the network information disclosure requirements established in the *Puerto Rico Order*.[64]

D. Interim Access Procedures

1. Background

35. The *Puerto Rico Order* required PRTC to implement interim access for multiple off-island carriers in the end offices though which it proposes to provide off-island service. That Order stated that such interim access for multiple carriers must: (1) provide AT&T-PR, as the traditional off-island carrier, with access arrangements at least as desirable as its current access; (2) provide AT&T-PR with superior access to the extent that the access arrangements are unequal; and (3) provide all other authorized carriers with access equal to that of PRTC's off-island interexchange operations.

36. PRTC also stated that it would implement full mainland style equal access throughout its service territory by the end of 1989. The *Puerto Rico Order* stated that the Commission intended to rely on this representation and the Commission made compliance with that promise a condition of PRTC's entry into the off-island markets.[65] The Commission stated that equal access would be deemed available in a particular end office when PRTC: (1) converts the end office to provide full mainland style FGD equal access capability; and (2) implements a presubscription balloting and allocation arrangement in compliance with our existing requirements. The Commission also noted that equal access includes nondiscrimination in installation, repair, and maintenance. Furthermore, in conjunction with both interim access and equal access, the Commission required that PRTC interconnect competing off-island carriers' switches with the island network upon reasonable request.

2. Positions of the Parties

37. A number of parties request clarification or reconsideration of the interim access plan approved in the *Puerto Rico Order*. In particular, CALL U.S., Comserv, and AT&T express concern that PRTC may receive preferential treatment under the interim access plan. Comserv also argues that the non-premium interim access available to it is inferior to Feature Group A access that it currently receives.[66] In addition, CALL U.S. and Comserv request that we delay implementation of interim access until ANI and ADS are available.[67] CALL U.S., Comserv, and AT&T contend that they have been disadvantaged by PRTC's decision to use certain interim access codes (135-01 and 135-10) for PRTC's own services.[68] Comserv argues that access codes should be assigned by lottery.[69] It further requests that all carriers receive three-digit access codes. CALL U.S. also expresses concern that other carriers and resellers may not receive the same treatment as PRTC in service order processing, network improvements, and maintenance. It also argues that the Commission has not considered the effect of the *Puerto Rico Order* on small interexchange resale carriers. AT&T states that it will suffer a degradation in service with interim access because it will not receive ADS, a capability it currently has at its international 1210 switch for over 80 percent of its international traffic.[70]

38. PRTC, however, stated that its off-island operations would not receive interim access superior to that available to the other new entrants in the off-island markets.[71] PRTC stated that its off-island services, like those of the other carriers, including AT&T-PR, would not have ANI or ADS, although it subsequently indicated that ADS would be available to all off-island carriers.[72] However, PRTC indicated that it would provide billing and collection services to all off-island carriers, including its own off-island operations, under the same terms and conditions. PRTC also stated that when interim access was implemented, all carriers other than AT&T-PR would be limited to carrying international calls with 10 or fewer digits, and would be unable to handle operator assisted off-island calls unless the customer dialed a seven-digit carrier access code.[73] PRTC argued that despite these limitations, the new non-premium interim access arrangement would be superior to Feature Group A access, if offered at discounted rates. However, PRTC indicated that providing five-digit access did not preclude it from providing Feature Group A access and stated that it could continue to provide Feature Group A to Comserv under its present arrangement.[74] In response to concerns about its access implementation schedule, PRTC stated that it would not have advance notice of which end offices would have interim access since they would be equipped simultaneously. PRTC also contended that the other carriers did not originally express any preference for the 135-01 and 135-10 interim access codes,[75] and questioned how desirable these five digit codes really

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until equal access is implemented. Detariffing of Billing and Collection Services, Report and Order, 102 FCC 2d 1150 (1986) (Detariffing Order), *recon. denied*, 1 FCC Rcd 445 (1986). The information sought by AT&T-PR appears to be of the type that would typically be included within the "recording" category.

[63] AT&T Opposition at 17.

[64] *See BOC ONA Order*, 4 FCC Rcd at paras. 252-254 for clarifications and implementing requirements. PRTC must comply with these requirements.

[65] The Commission stated that this requirement would be waived if PRTC showed that it cannot reasonably complete its equal access conversion in this timeframe. The Commission also provided for waiver of this requirement in the case of small end offices under certain circumstances. *Id.* at 6607, para. 40. The Bureau, at PRTC's request, extended the conversion date to September 30, 1990, and subsequently to December 31, 1990.

[66] Comserv Petition at 2.

[67] *See infra* para. 38 regarding the availability of ANI and ADS. CALL U.S. Petition at 5; Comserv Petition, Attachment 2, at para. 6.

[68] Comserv Petition, Attachment 2, at para. 7; AT&T Opposition at 5; CALL U.S. Petition at 5.

[69] Comserv Petition, Attachment 2, at para. 7; CALL U.S. Petition at 4.

[70] AT&T Opposition at 10.

[71] PRTC Reply to Petitions at 3, n.3.

[72] Exchange Carrier Association, Inc., FCC Tariff No. 1, Transmittal No. 293 (filed March 23, 1988).

[73] PRTC Reply to Petitions at 3, n.7

[74] *Id.* at 7.

[75] PRTC Reply to Petitions at 8. PRTC stated that it has agreed to make the access codes 135-IX and 135-OX available to off-

were since most customers still had rotary dial telephones.[76] In addition, PRTC stated that it could not modify its electromechanical switches to accept three-digit access codes for all off-island carriers without incurring substantial additional costs.[77]

3. Discussion

39. Many of the concerns about interim access presented by the parties involved the question of whether PRTC would receive superior interconnection or service because of its position as a LEC. Based on the record, we conclude that the interim access structure approved in the *Puerto Rico Order* was fair and reasonable given facilities constraints. In light of PRTC's responses to the concerns raised by the other off-island carriers, we conclude that PRTC's (now TLD's) interim access was not superior to that of the other off-island carriers.[78]

40. We do not find that the 135-01 and 135-10 access codes were so peculiarly advantageous that we should have required the reassignment of these codes. First, PRTC indicates many of the telephones in Puerto Rico are rotary telephones which makes the "0" digit disadvantageous due to the dialing delay factor. Second, reassignment of access codes was not desirable in light of the potential for customer confusion and the relatively brief period of interim access. Nor do we believe that PRTC could have reasonably provided three-digit interim access codes for all IXCs. Accordingly, we do not modify the interim access or equal access requirements previously adopted.

E. Commission Procedures

1. Background

41. On February 8, 1983, the Commission granted PRTC authority to provide off-island services between Puerto Rico and the U.S. mainland, Puerto Rico and the Virgin Islands,[79] and between Puerto Rico and Canada[80] on a competitive basis. The Court of Appeals for the District of Columbia Circuit subsequently vacated and remanded to the Commission both of these orders.[81] The court stated that the Commission acted improperly in granting PRTC's application to compete with AACR when the applications filed by PRTC actually sought to replace AACR as the monopoly provider. In particular, the court stated that the issues involved in authorizing competitive entry were considerably different from those involved in a proceeding to substitute one monopoly carrier for another. As a result, the court found that AACR had not had an adequate opportunity to address the issues concerning competition. It also stated that the Commission had not developed a sufficient record on which to evaluate competitive entry. The Commission subsequently instituted this rulemaking proceeding to establish policies concerning competitive entry in the off-island markets.

2. Positions of the Parties

42. APIP asserts that the Commission violated statutory remand restrictions in Section 402(h) of the Communications Act by instituting further proceedings on remand without obtaining prior permission from the court.[82] APIP also contends that the court asked the Commission to resolve specific factual issues regarding the existing litigants, and that the Commission abused its discretion by addressing these issues in a rulemaking proceeding rather than an adjudication.[83]

43. AT&T opposes APIP's contentions, arguing that the Commission's post-remand actions were appropriate. AT&T notes that after the court remand, the Commission dismissed PRTC's mainland application as stale, leaving only the Canada application pending. AT&T argues that the Commission was justified in establishing a new proceeding because of amendments to this application that necessitated a further comment opportunity. Moreover, AT&T states that after the court remand, other parties filed for authority to offer Puerto Rico-Canada service, justifying a broad-scale inquiry. AT&T also argues that APIP provides no evidence of harm resulting from this procedural approach. Finally, AT&T argues that APIP's suggestion that the Commission begin consideration of this matter *de novo* is impractical and unwarranted.

44. PRTC also argues that APIP's contentions are meritless, and contends that APIP fails to allege the direct, tangible and substantial' injury required to give APIP standing to participate when it was not previously a party to this proceeding.[84] In addition, PRTC argues that the Commission has given proper effect to the court's order, acting within the bounds of its discretion and the require-

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island carriers. In addition, it stated that Comserv has specifically requested 135-14 and 135-04. PRTC Reply to Opposition at 3, n.7.

[76] With a rotary dial telephone, dialing a zero requires more time than dialing other numbers.

[77] PRTC explained that its electromechanical Pentacosta switches were designed to European standards and could not be modified, but must be replaced, to provide Feature Group D access. PRTC stated that five digit interim access could be provided through software changes to the class 4 toll office electronic switches, and argued that more extensive changes would not be cost effective since these offices would be converted to digital switches and Feature Group D equal access. PRTC Reply to Petitions at 2, 9 n.6.

[78] We do not require in this Order that PRTC provide a report on service order processing, network improvements, and maintenance. However, since parties express concern regarding PRTC's treatment of their requests for these services, we emphasize that PRTC must provide these services to all off-island carriers, including TLD, in an equitable manner that complies with fundamental Commission policies of fair competition.

[79] Puerto Rico Telephone Company, 92 FCC 2d 1444 (1983) (*Mainland Authorization Order*).

[80] Puerto Rico Telephone Company, 92 FCC 2d 1461 (1983) (*Canada Authorization Order*).

[81] All America Cables and Radio, Inc v. FCC, 736 F. 2d 752, 761 (D.C. Cir.1984). (*All America Cables and Radio*).

[82] APIP submits that it is an interested party and thus entitled to participate in this docket pursuant to the Commission's rules governing reconsideration proceedings because it is authorized to provide voice and data transmission between Puerto Rico and the U.S. mainland. It also states that it holds FCC licenses for six point-to-point microwave facilities in Puerto Rico which it plans to use to provide service between Puerto Rico and the mainland, pending action on requests for authorization to provide intra-island service. APIP Reply at 3. *See* Section 405 of the Communications Act, 47 U.S.C. 405; Section 1.429 of the Commission's rules, 47 C.F.R. Section 1.429.

[83] APIP claims that proper adjudicatory proceedings reviewing PRTC's past anticompetitive conduct would have led the FCC to bar entry by PRTC. APIP Petition at 1-2.

[84] PRTC argues that cases cited by APIP do not support its position because they require direct and substantial injury to a party. *See* PRTC Reply to Petitions at 10.

ments of Section 402(h). PRTC notes APIP's acknowledgement that the court remanded the case to the Commission for development of a more complete record, and argues that there is nothing in Section 402 (h) that prevents use of a rulemaking proceeding rather than an adjudicatory hearing in such circumstances. PRTC further argues that the use of a rulemaking proceeding was entirely appropriate, stating that this proceeding involves the establishment of broad policies and guidelines of future applicability concerning the ground rules for competition in the off-island Puerto Rico markets. In this regard, PRTC emphasizes that the Commission has wide latitude to choose whether to proceed by rulemaking or adjudication.[85]

45. PRTC also contends that the legislative history of Section 402(h) shows that it was enacted to ensure that the interests of parties were not prejudiced in comparative licensing proceedings by the introduction of new issues or parties after a court remand.[86] PRTC states that the central issues in this proceeding are the same before and after remand -- whether to allow competition in the off-island market, and whether, and under what conditions, PRTC should be allowed to enter that market.

3. Discussion

46. We believe that our actions in this post-remand proceeding satisfy the statutory standard of Section 402(h) and are entirely consistent with the court's remand in *All America Cables and Radio*. The court in that case found that the Commission had not developed a record sufficient to support competitive entry in the off-island markets. Since the remand was based on this conclusion that the existing record was inadequate,[87] the court in remanding the case "for further proceedings not inconsistent with this opinion,"[88] clearly expected the Commission to conduct further proceedings concerning competitive entry in the Puerto Rico off-island markets.[89] An explicit order to that effect, which APIP insists is necessary, would be superfluous.[90] Moreover, given its conclusions regarding the inadequacy of the record, it does not appear logical that the Court intended the Commission to take further action "upon the basis of the proceedings already had and the record upon which said appeal was heard and determined," pursuant to Section 402(h) of the Act.

47. The Commission's use of rulemaking procedures to govern further proceedings on PRTC entry into the off-island market was a reasonable exercise of the Commission's discretion,[91] and comports with the traditional use of rulemaking procedures to develop general market entry policies in other proceedings.[92] The issues considered in this proceeding are entirely appropriate for resolution in a rulemaking proceeding since those issues involve the general terms and conditions for future competitive entry in the off-island Puerto Rico market by all carriers.[93]

III. CONCLUSION

48. In this proceeding, the Commission has developed detailed guidelines for competitive entry into the off-island Puerto Rico markets. Throughout this process, the Commission has sought to balance the need for competitive safeguards against the additional burdens that these measures place on PRTC. Thus, the Commission has sought to impose requirements that will foster fair and open competition while avoiding unnecessary burdens on PRTC. We believe that our guidelines for competitive entry, with the minor modifications adopted, provide a sound basis for the development of competition, in light of the revised corporate structure for the provision of off-island services proposed by PRTC. The requirements we are retaining will help to avoid the development of regulatory disputes that could hinder competition in these markets, and are appropriate at this stage in the development of these markets.

IV. ORDERING CLAUSES

49. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 202, 214, 308-310, 319 and 405 that the Petitions for Reconsideration ARE GRANTED to the extent indicated herein and ARE OTHERWISE DENIED.

50. IT IS FURTHER ORDERED, That the late comments filed by MCI Corporation, Inc. ARE ACCEPTED.

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[85] PRTC Reply to Petitions at 16.

[86] *Id.* at 14.

[87] *See e.g., All American Cables and Radio*, 736 F. 2d at 758-60.

[88] *Id.* at 761.

[89] In fact, APIP appears to recognize this when it states that the court "remanded the case to the Commission for further proceedings to define the relevant market, analyze its present make-up and status, and make predictions as to the likely changes following the introduction of competition." APIP Petition at 3-4. This proceeding provided ample opportunity for APIP and other parties to submit information about PRTC's past practices that APIP claims would have led us to bar entry by PRTC.

[90] In any event our prior practice has been to retain discretion to order post-remand proceedings, and it appears that at this date, the Commission would not be able to enforce any interpretation of Section 402(h) as constituting a flat bar on post-remand proceedings. *See* Eastern Carolinas Broadcasting Co. v. FCC, 762 F.2d 95, 101 (D.C. Cir. 1985).

[91] SEC v. Chenery Corp., 332 U.S. 194 (1947). APIP concedes in its petition that "the Commission has wide latitude to chose [sic] either to proceed by rulemaking or by adjudication," although the choice must be "rational." APIP Petition at 11.

[92] The Commission used a rulemaking proceeding to determine whether competitive carriers should be allowed to enter the interexchange market in order to provide specialized services. *See* Specialized Common Carrier Services, 29 FCC 2d 870 (1971), *recon.*, 31 FCC 2d 1106 (1971), *aff'd sub nom.* Washington Utilities and Transportation Commission v. FCC, 513 F. 2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975); Domestic Satellite Facilities, 35 FCC 2d 844 (1972), *recon.*, 38 FCC 2d 665 (1972). The Commission developed its competitive policy for the provision of domestic interexchange switched services in a rulemaking proceeding. MTS and WATS Market Structure, 73 FCC 2d 222 (1979); Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 177 (1980).

[93] In National Small Shipment Traffic Conf., Inc. v. ICC, the court stated that "[t]rial-like procedures are particularly appropriate for retrospective determination of specific facts... [while] [n]otice-and-comment procedures...are especially suited to determining legislative facts and policy of general, prospective applicability. 725 F.2d 1442, 1447-48 (D.C. Cir. 1984) (citations omitted).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Oppositions and Replies to Petitions

American Telephone and Telegraph Co. (AT&T) (February 16, 1988)

A-Plus Information Processing Corporation (APIP) (February 16, 1988)

Puerto Rico Telephone Company (PRTC) (February 16, 1988)

Parties Filing Replies to Oppositions

APIP (March 9, 1988)

PRTC (March 9, 1988)

Parties Filing Comments

MCI Telecommunications Inc. (MCI) (May 23, 1990)

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 16, 1992

COMMON CARRIER BUREAU SOLICITS COMMENTS REGARDING MODIFICATIONS AND IMPROVEMENTS TO THE TARIFF REVIEW PLAN

Comment Date: January 6, 1993

To aid our review of the required annual revisions of the local exchange carriers' (LECs) interstate access tariffs, the Common Carrier Bureau has developed Tariff Review Plans (TRPs). TRPs specify certain information that LECs must file in a uniform format. In each of the last seven years, the Bureau has prepared TRPs, after consultation with the LECs and their customers, reflecting both the specific information needed in light of changes in relevant Commission rules and policies and the most effective and least burdensome methods of supplying this information. The TRPs developed through this process are subject to approval by the Office of Management and Budget in accordance with the provisions of the Paperwork Reduction Act, 44 U.S.C. §§ 3506 et seq.[1]

In preparation for the 1993 annual access tariff filings, currently scheduled to be filed on April 2, 1993, the Bureau is examining changes in the TRP necessary to reflect recent rule changes, other relevant events, and our experience in using TRPs. The most significant change for the filings this year will be the incorporation of Open Network Architecture rates in the price caps indexes.

As we have in the past, the Bureau wishes to obtain the views and advice of customers and other interested persons in order to develop any needed modifications and improvements in the TRP. In order to adopt a final TRP as far in advance of the annual access tariffs filing date as possible, and to enable the TRP to produce the information needed by the Commission to conduct its review of the tariffs in accordance with the Communications Act, the Bureau has determined that an expedited and informal procedure would be most useful.

Interested persons wishing to express their views regarding modifications and improvements to the TRP may do so by letter addressed to the Chief, Tariff Division, Common Carrier Bureau, Federal Communications Commission, 1919 M Street, N.W., Room 518, Washington, D.C. 20554. We invite comment on the form the TRP should take both for carriers subject to price caps regulation and for carriers subject to the rate of return rules. We also solicit comment from the price caps carriers on any exogenous changes they plan to request, beyond those included in the 1992 annual access tariff filing. These comments should be received no later than January 6, 1993, to allow the Bureau an opportunity to consider them. No reply comments will be considered.

Copies of comments may be obtained from Downtown Copy Center. The comments are also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact John Scott (202) 632-6312 of the Common Carrier Bureau, Tariff Division.

FEDERAL COMMUNICATIONS COMMISSION

[1] The 1992 TRP, adopted in Commission Requirements for Cost Support Material To Be Filed with 1992 Annual Access Tariffs, DA 92-174, Order, released Feb. 10, 1992, bore OMB Approval Number 3060-0400.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Applications of AmCom of Louisiana, Inc. for Renewal of the Licenses for Stations KRMD and KRMD-FM, Shreveport, Louisiana	File Nos. BR-890201WT and BRH-890201WU

ORDER

Adopted: December 21, 1992; Released: December 31, 1992

By the Commission:

1. In a January 1992 decision, the Commission granted the license renewal applications for stations KRMD(AM) and KRMD-FM, Shreveport, Louisiana. *Memorandum Opinion and Order and Notice of Apparent Liability, Certain Broadcast Stations Serving Communities in the State of Louisiana*, 7 FCC Rcd 1503 (1992) (*Louisiana Renewals*). As part of that decision, the Commission denied an informal objection in which the Louisiana Consumers League (LCL) challenged several programming decisions of the stations' licensee, AmCom of Louisiana, Inc. (AmCom). LCL filed a Petition for Reconsideration but subsequently reached a settlement agreement with AmCom. The Commission currently has before it a Joint Request for Approval of the LCL/AmCom Settlement Agreement and a Petition in which LCL seeks to withdraw its request for reconsideration.[1]

BACKGROUND

2. LCL's original challenge of AmCom's renewal applications arose out of AmCom's decision to terminate an on-air interview with consumer "advocate Remar Sutton, after Sutton warned consumers not to trust car dealers who advertised on the stations. LCL alleged that AmCom's decision placed its own economic interests above the public interest, and that curtailment of the Sutton interview, like suppression of news programming, violated the public trust. The Commission rejected the news suppression analogy because the programming at issue was of a non-news nature. The Commission found that the licensee had not violated our public interest standard because the licensee's actions did not pose a substantial risk of serious harm to listeners.[2] *See Louisiana Renewals*, 7 FCC Rcd at 1507.

3. LCL sought reconsideration of the Commission's decision but agreed to withdraw that reconsideration request in exchange for AmCom's (1) payment of $17,500 toward LCL's legal expenses; (2) broadcast of an apology concerning termination of the Sutton interview; and (3) production and airing, at no cost to LCL, of a series of 30-second public service announcements on behalf of LCL and of thirty 60-second vignettes featuring LCL's Executive Director speaking about consumer issues.[3]

DISCUSSION

4. The Commission requires that parties seeking to withdraw a petition to deny or informal objection must document that any money or other consideration paid in exchange for the withdrawal will not exceed the withdrawing party's legitimate and prudent expenses in preparing, filing, and prosecuting its objection. 47 C.F.R. § 73.3588. The purpose of this requirement is to ensure that objections to renewal applications further legitimate public interest purposes rather than serving as a way for persons to profit by extracting payments from incumbent licensees. *First Report and Order, Prevention of Abuses of the Renewal Process*, BC Docket No. 81-742, 4 FCC Rcd 4780, 4786 (1989), *aff'd Memorandum Opinion and Order*, 5 FCC Rcd 3902 (1990).

5. In the present case, LCL states that it incurred $30,518.75 in legal expenses in connection with preparation of the informal objection, preparation of a Reply to AmCom's Opposition, preparation of the Petition for Reconsideration, and negotiation/drafting of the Settlement Agreement. We have examined the documentation submitted with respect to these expenses and conclude that the costs were legitimate and prudent. To find the Settlement consistent with our requirements, we must next determine that LCL will not receive consideration in excess of these expenses.

6. LCL believes that the $17,500 cash payment to LCL is the only factor to be considered in the Commission's analysis of whether the agreement's consideration is less than LCL's expenses. LCL maintains that the settlement's programming proposals are not relevant to this analysis because LCL will not receive a fee for its participation and the resulting consumer-oriented programming will benefit

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[1] There also are several other matters related to the stations' license renewal applications pending before the Commission. These matters include: a Petition in which AmCom seeks reconsideration of the grant of short term renewals and of the issuance of a Notice of Apparent Liability for violations of our EEO rules; a Petition for Reconsideration filed by the NAACP; a Request by the NAACP to withdraw its Petition; and a Settlement Agreement between AmCom and the NAACP. These pleadings are based on substantially different issues from those considered herein and will be addressed in a separate order.

[2] The Settlement Agreement provides that LCL shall remain free to challenge the Commission's analysis in paragraph 31 of the KRMD decision and that AmCom will not oppose any such challenge. Counsel for LCL has since clarified orally that this language is intended to preserve LCL's discretion to raise this matter in future unrelated proceedings and that LCL is not retaining any right to continue its challenge in the present proceeding. Under these circumstances, and given LCL's statements on the record seeking to terminate fully its participation in this proceeding, this provision is not an impediment to approval of the Settlement Agreement.

[3] The Settlement Agreement provides for the licensee to broadcast programming of which the content "shall be determined by the LCL subject to such standards as AmCom may reasonably apply to insure that the [programs] are truthful, in good taste, and comply with the requirements of applicable law." In a letter dated August 7, 1992, counsel for the parties clarified that AmCom will retain full editorial control over all of the programming aired pursuant to the Settlement Agreement, thereby allaying any concerns that the above-referenced language could be interpreted as restricting the licensee's control over station programming.

KRMD's listeners. We disagree with this reasoning. Section 73.3588 of our rules makes clear that the Commission includes in the definition of consideration "financial . . . as well as non-financial concessions that confer any type of benefit on the recipient." 47 C.F.R. § 73.3588(c)(4). Thus, regardless of whether any fee payment is involved or whether any public benefit may result from provisions of a settlement agreement, such provisions will be treated as consideration to the extent that they confer a benefit on the petitioner.[4] *Id.* Several aspects of the Settlement Agreement appear to confer a benefit on LCL. Absent the agreement, LCL would likely have had to pay for the costs associated with production of the public service announcements and vignettes. Also, while the licensee asserts that it would have aired the public service announcements free of charge, it appears that the licensee would ordinarily have charged LCL approximately $2520 to air the vignettes, which will feature LCL's executive director speaking on topics of LCL's choice. Based on these benefits to LCL, we conclude that the value of the program production assistance and broadcast time are properly included as consideration for the purpose of the Commission's analysis of whether the settlement calls for payments in excess of legitimate expenses. It appears, however, that the value of these programming provisions combined with the cash settlement is still well under LCL's documented legitimate and prudent expenses and, therefore, we find that the settlement is consistent with the public interest.[5] Accordingly, we shall approve the Settlement Agreement and the Withdrawal of the Petition for Reconsideration.

ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that pursuant to the authority contained in Section 4(i) of the Communications Act of 1934, as amended, that the Settlement Agreement of April 29, 1992 between AmCom of Louisiana, Inc. and the Louisiana Consumers League, as clarified by counsel for the parties (see notes 2 and 3 above), IS APPROVED.

8. IT IS FURTHER ORDERED that the Louisiana Consumers League's Petition to Withdraw its Petition for Reconsideration in this proceeding IS GRANTED and, accordingly, that Petition for Reconsideration IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[4] The question of whether the petitioner is receiving a fee for services it will render for the licensee is an entirely separate matter. When a settlement agreement provides for a petitioner to perform services for a fee, there is a rebuttable presumption that the settlement is contrary to the public interest. *See Prevention of Abuses of the Renewal Process*, 4 FCC Rcd at 4786. We need not consider this matter further because LCL will not be receiving any fee for services in the present case.

[5] Given the $17,500 cash payment, plus the $2,520 of radio air time, LCL could receive additional compensation valued at up to $10,498.75 without exceeding its $30,518.75 of legitimate expenses. The parties did not assign a monetary value to AmCom's production services. However, based on the limited nature of the announcements AmCom has agreed to produce pursuant to the Settlement Agreement (30 and 60-second radio spots consisting of recorded statements by LCL's executive director), it is readily apparent that AmCom's relatively minimal production efforts would have a fair market value substantially less than the allowable $10,498.75.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

JEM BROADCASTING COMPANY, INC. File No. BPH-880714NT

For Construction Permit for a
New FM Station on Channel 293C2
in Bella Vista, Arkansas

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 1992; Released: December 31, 1992

By the Commission:

1. By Memorandum Opinion and Order in *JEM Broadcasting Company, Inc.*, 7 FCC Rcd 4324 (1992), we denied a petition for reconsideration filed by JEM Broadcasting Company, Inc. ("JEM")[1] and affirmed the Bureau's dismissal of JEM's captioned application because it contained inconsistent geographic coordinates for the proposed transmitter site. On August 10, 1992, JEM filed a petition for reconsideration of that action.[2] For the reasons set forth below, we now deny that petition.

2. In the instant petition for reconsideration, JEM argues that the Commission's FM "hard look" processing rules[3] which restrict JEM from belatedly filing an amendment to cure its coordinate discrepancies are invalid because they were adopted without notice and an opportunity for public comment, that Section 309(d)(2), (e) of the Communications Act guaranteed JEM a right to a hearing before its application could be dismissed, and that, in sum, dismissal of the JEM application deprived it of due process of law.

3. We disagree with JEM and find all of its arguments to be without merit. First, as we previously indicated (7 FCC Rcd at 4324), Section 73.3522(a)(6) of the Rules restricts the filing of an amendment to cure an acceptability defect (such as the instant coordinate discrepancy) to the 30-day period following issuance of public notice of the acceptance of the application for tender. 47 C.F.R. § 73.3522(a)(6).[4] This rule provision was adopted by *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936, published May 13, 1985. The *Notice of Proposed Rule Making* in that docket explicitly sought public comment on alternative cut-off procedures in order to reduce the cost and delay involved in commercial FM application processing. 49 Fed. Reg. 36523, 36524-25, published September 18, 1984.[5] Thus, the *Notice of Proposed Rule Making* in MM Docket No. 84-750 provided adequate notice that the scope of the rulemaking contemplated possible changes to the cut-off rule for amendments to applications. Indeed, the notice provided was more than adequate since none was required. As we observed in the *Report and Order*, the revisions made to the amendment process involved rules of Commission practice and procedure, which, pursuant to 5 U.S.C. § 553(b)(A) and 47 C.F.R. § 1.412(b)(5)), are exempt from notice and comment rule making requirements. 50 Fed. Reg. at 19941 n.31. *See Ranger v. FCC*, 294 F.2d 240, 243-244 (D.C.Cir. 1961).

4. Second, long-standing precedent holds that Section 309 of the Communications Act does not prevent the Commission from adopting measures to provide for orderly processing, nor does it require the Commission to hold a hearing on an application which does not comply with the Commission's rules. *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192, 202-203 (1956); *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 n.9 (1945); *see Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C.Cir. 1991) (affirming dismissal without hearing of application which was not acceptable for filing). Finally, it follows that the dismissal of the JEM application complied with all due process requirements. In this respect, we reject JEM's argument that dismissal of its application amounts to a governmental taking of its valuable property. Applicants do not have a vested interest in the facilities they seek. *See* 47 U.S.C. § 301; *Orange Park Florida T.V., Inc. v. FCC*, 811 F.2d 664, 674 (D.C.Cir. 1987) (citing *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 n.5 (D.C. 1986)); *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 61 n.18 (D.C.Cir. 1978).

5. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed on August 10, 1992 by JEM Broadcasting Company, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] JEM's petition for reconsideration was referred to the Commission by the Mass Media Bureau ("Bureau") pursuant to 47 C.F.R. § 1.104(b).

[2] An opposition was filed by Gayla Joy Hendren, and JEM filed a reply.

[3] The Commission recently modified the "hard look" processing rules, and made these revised rules effective as of August 7, 1992. *Report and Order, Commercial FM Broadcast Applications*, MM Docket No. 91-347, 7 FCC Rcd 5074 (1992). The Commission determined that applications filed prior to that date would continue to be processed under the rules in effect on the date of the application's receipt.

[4] JEM does not dispute that its application contained a coordinate discrepancy and that it did not file a timely curative amendment.

[5] Under the pre-"hard look" rules, the "A" and "B" cut-off dates limited an FM applicant's rights to file amendments. 50 Fed. Reg. at 19937. This system continues to apply to AM, TV, and noncommercial educational FM applications.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 23, 1992

Released: December 31, 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Penfold Communications, Inc. 8210-SM/MD
Licensee, Noncommercial 92030639
Radio Station KRTM(FM)
28715 Via Montezuma
Temecula, CA 92390

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended. It is issued under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

Section 399B of the Communications Act and Section 73.503(d) of the Commission's Rules specifically prohibit noncommercial stations from broadcasting announcements that promote the sale of goods and services of for-profit entities in exchange for consideration paid to the station. Although contributors of funds may receive on-air acknowledgments, the Commission has unequivocally stated that such acknowledgments may be made for identification purposes only and should not promote the contributor's products, services, or company. Accordingly, such announcements may not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease. *See Public Notice*, "In the Matter of the Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations," 7 FCC Rcd 827 (adopted April 11, 1986). Additionally, the longer an announcement takes to "identify" an underwriter, the more likely it is to be promotional. *See Letter to WNYE-TV*, 7 FCC Rcd 6864 (MMB 1992).

Because of complaints indicating that KRTM(FM), Temecula, CA, might have violated Section 399B of the Communications Act and related Commission rules and policies, we sent you a letter of inquiry dated January 10, 1992. The letter sought specific information concerning the underwriting announcements transcribed in Attachment 1.

In your March 16, 1992, response you admit that Station KRTM(FM) aired the announcements in question. You contend, however, that these announcements acknowledge sponsors' contributions in support of public broadcasting and identify their products or services, without engaging in impermissible "promotions." Specifically, you contend that, on the whole, the announcements cited contain expanded or enhanced identifying information but do not demonstrate a "clear abuse of discretion" in interpreting the Commission's noncommercialization guidelines. Furthermore, you claim that you have stopped running these announcements and have taken other appropriate remedial actions to ensure future compliance.

We disagree that the subject announcements fall within the range of permissible enhanced underwriting. They contain price information (e.g., "David A. Lander believes that if his client does not recover damages, he does not collect a fee"), calls to action (e.g., "So do yourself a favor and comeout to the Murrieta Hot Springs Resort"), and inducements to buy (e.g., "Big O Tires Express Lane Service guarantees that four tires will be installed in 20 minutes or less"). In addition, they contain comparative and qualitative language (e.g., "I find the people [at Temecula Chrysler Center] to be very accommodating and the owners, John Harrison and Gary Anderson, to be delightfully honest"; "Overland [Bank] reaches out to the business community . . . to deliver quality financial services to your place of business") that clearly exceeds the identification-only purpose of underwriting and donor acknowledgments. Some of the announcements (like the ones for "Direct Doctors" and "Appliance Superstore," items 9 and 18 in Attachment 1), besides containing overtly promotional language, demonstrate the tendency to exceed identification by dwelling at length on the usefulness, convenience, or advantages of the products or services mentioned.

Furthermore, since your March 1992 response, we have received additional information indicating that KRTM continues to air such announcements. For example, it is alleged that on April 10, 1992, KRTM aired the announcements in Attachment 2, some of which contain the same or similar comparative language ("Honda is number one in import owner loyalty," "Nissan of Temecula, number one in both sales and service in Southern California"), price information ("At Pinky's Bar and Grill every Thursday night is ladies' night"), and non-identifying verbosity (such as the 15 repetitions of "Nissan of Temecula") that prompted our letter of inquiry.

Based on the evidence before us, it appears that you have violated Section 399B of the Communications Act and related Commission rules and policies concerning the broadcast of advertisements by noncommercial educational stations. Accordingly, you are hereby advised of your apparent liability for a total forfeiture of Five Thousand Dollars ($5,000) for your apparent repeated violations of Section 399B of the Communications Act, in the manner specified above, between December 1991 and April 10, 1992. You are admonished for the violations that occurred prior to December 1991, as those are beyond the forfeiture statute of limitations, 47 U.S.C. § 503 (b)(6)(A).

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). Under these standards, $2,500 is the base forfeiture for violation of underwriting and related limitations on noncommercial broadcasts. The violation in this case is exacerbated, however, because the violations were repeated. Under the circumstances, we find that a forfeiture in the amount of $5,000 is appropriate for the apparent advertisements.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be

pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

ATTACHMENT 1

February - December 1991

1. This is Frank Wickerson, General Manager of Honda of Temecula. We're committed to the Valley and the future. According to R. L. Polk and Company's leading import sales analysis from January 1991, Honda is #1 in import owner loyalty, and at Honda of Temecula we challenge ourselves every day to improve on the standards we have set and to maintain the respect of all our customers. No gimmicks -- it's that simple! Honda of Temecula is on Jefferson, south of Winchester.

2. Hello, this is Frank Wickerson, General Manager of Honda of Temecula. At Honda of Temecula we are recognized by Honda as a satisfaction plus dealer, and our challenge is to maintain and improve on the standards we have set. We're committed to the Valley and to the future. For your convenience, our service department hours are from 7:30 a.m. until 6:00 p.m., Monday through Friday, Saturdays 7:30 a.m. until 5:00 p.m. No gimmicks -- it's that simple. Honda of Temecula is on Jefferson, south of Winchester.

September - December 1991

3. Best for Less Tires, in Temecula, is a family affair. Owner, Rich Richardson has lived in this area for four years and believes that in a community where changes are taking place so quickly people need an automotive store where they can be assured of honest service. That's why Best for Less Tires sticks by their motto "Count on Us after the Sale." Best for Less Tires stocks name brand tires, such as Uniroyal, Bridgestone, Goodyear, Dunlap, B.F. Goodrich and Michelin. In addition, Best for Less Tires takes care of general automotive services. Best for Less Tires, on Via Montezuma in Temecula. The new Perris store is opening on October 16th.

January 1991 - January 1992

4. World and regional news brought to you by Overland Bank, the Valley's home grown bank. Overland Bank is Temecula's original independent commercial bank. Locally owned and managed. Overland reaches out to the business community with on-call officers and messengers to deliver quality financial services to your place of business. Located in the Overland Financial Center on Jefferson between Rancho California Road and Winchester Road in Temecula. Overland Bank, member FDIC and the Community. Overland supports the "Shop Temecula First" campaign.

June 1991 - January 1992

5. Temecula Valley Magazine: the connection to Valley lifestyles. Temecula Valley Magazine offers exciting reading and informative articles on the Valley, the newest "Hub" of the Southland. Each issue of Temecula Valley Magazine offers sections on gold, wine, dining, entertainment and other activities of interest to the active lifestyles of the Valley. Temecula Valley Magazine is available on a subscription basis as well as local newsstands. Their phone number is 699-0710.

July - November 1991

6. World and regional news brought to you by Postal Annex, your full service copy center. Offering you xerox copies, fax service, next day mail, UPS, mail boxes, keys, stamps, plus all of your office needs. Why wait in line for all of these services when Postal Annex can speed you through in no time at all? Now at two locations to serve you. The original in the Target Albertson Center in Temecula and their new location in Murrieta at I-215 and Murrieta Hot Springs Road.

7. The news has been made possible by Overland Bank. Courier, Cheryl Alexander, tells why successful businesses use Overland Bank: "As the courier for Overland bank I service the customers in any way that's possible. Picking up their deposits, get their transactions back and forth, without them having to leave their place of business, carry documents; using a courier service is convenient, it doesn't interrupt their day." Overland Bank the only locally owned, independent bank serving Temecula, member FDIC and the community.

October - November 1991

8. Let the games begin. The competition is under way Wednesday nights at Bel Aire 57. We compete for prizes, cash and we have a ball. We sing your favorite hits with an entire orchestra or rock band backing you up. Now that's a dream come true. Bel Aire 57 Wednesday night is the competition: Tuesday night is open-mike night. We get ready, we sing all night long; practice, practice, practice, to enter a song in Wednesday night's competition. Bel Aire 57, on Front Street, in Temecula.

July - October 1991

9. Someone get me a doctor, one I can really relate to. This man is suffering from a common complaint. There are times when you need to find another doctor. And that's where Direct Doctors can help. You mean mail order? Not exactly. Direct Doctors is a free, fast physician referral service that's dedicated to matching patients and doctors. So as well as doing our best to find a doctor who's close to your home or work and available when you want him, or her, Direct Doctors makes sure that the doctor you get is the doctor you really want. They'll even make your first appointment there and then. Inland Valley's Regional Medical Center Direct Doctors Physician referral service is available at 677-5692, 6:00 AM to 6:00 PM weekdays, and 6:00 AM to 12:00 noon on Saturdays.

June - October 1991

10. Here's Joan Sparkman, senior vice-president of Temecula Valley Bank, on why she purchases her New Yorkers from Temecula Chrysler Center. "Hi. I'm one of those satisfied customers from Temecula Chrysler Center in Temecula. I bought my New Yorker there about three years ago and I am just about in the process of trading it in on a new one. I find the people there to be very accommodating and the owners, John Harrison and Gary Anderson delightfully honest." At Temecula Chrysler Center, 26755 Ynez Road.

May - July 1991

11. "Keith, now what are you doing?" "Trying to get around this buck." "But I told you you can get everything you need from hardware supplies, cleaning supplies, your shaving kit, even medical and first aid supplies at Around-A-Buck on Front Street." "Yep, that's what I'm doing." "I don't get it." "Well, I guess it's like the pot of gold at the end of the rainbow, only I'll get everything I need when I get around this buck!" "I think I get it." "Great, then help me move this thing."

April - July 1991

12. "Hello." "Hi, it's John." "John, you calling me again, and this is long distance. Are you feeling okay?" "Ever since you told me about United Telephone Service, long distance is no problem. Especially with their local rates in the 714, 619, 213 and 818 area codes." "And don't forget United Telephone Service offers domestic and international long distance." "But did you know for a limited time United Telephone Service is including 800 service with their basic package?" "Great, what's their number?" "It's 1-800-748-5876." "Wait a minute -- I already have United Telephone Service."

13. World and regional news brought to you by the law office of David A. Lander. David A. Lander emphasizes bodily injury law, accidents and bankruptcies. He can also help with immediate debt relief. David A. Lander believes that if his client does not recover damages, he does not collect a fee. The law office of David A. Lander is on Enterprise Circle North in Temecula. His phone number is 699-8272.

June - July 1991

14. KRTM, in conjunction with the Californian and event planners, present "A Taste of the Valley," Sunday, July 14th at the Murrieta Hot Springs Resort. This one is for the kids so come on out and help support the community recreation center and enjoy the taste of our area's finest restaurants and wineries. Sample the delectables from Mt. Palomar, Park Cafe and Catering, Penfold's Restaurant, The Temecula Pizza Company, Shakespeare's Pub and Grill and Tony Roma's, just to name a few. You'll be entertained all evening with live hot jazz and great conversation. So do yourself a favor and come out to the Murrieta Hot Springs Resort, Sunday, July 14th from 4 to 7 p.m. Tickets are available for just $35.00 per person or $50.00 per couple and includes a commemorative wine glass. You can purchase your tickets here at KRTM or from the Californian. We'll see you there.

December 1990 - February 1991

15. Action Pool and Spa Suppliers is at 27497 Jefferson Temecula. A full-service pool store. Airmata is your pool's best friend. Action Pool and Spa Supply is under new management and George and Mike are always ready to give Temeculans prompt and expert service. Their phone number is 676-8181. Action Pool and Spa Supply.

[No date]

16. If you're in a hurry for tires, Big O Tires Express Lane Service guarantees that four tires will be installed in 20 minutes or less.

November - December 1990

17. Today, the big time seems to be happening at Carlson Furniture at the Target Shopping Center at Rancho California Road. Carlson Furniture is going out of business and you know what that means -- I'm going down before it's too late. Well, I'm out of here, too. The furniture at Carlson must be sold immediately. They're going out of business and you know what that means -- Universal, Stiffal, Lane, Birkline, the selection is great today. Tomorrow a different story. Carlson Furniture is at the Target Shopping Center -- but not for long.

September - December 1990

18. "Ooh my, grandmother! What big, beautiful pies you baked. And Grandmother, what a big golden turkey you cooked. Why, I don't think I've ever seen one this large. Ooh my, grandmother! What a big oven you have and it looks so easy to clean. Ooh, grandmother, where ever did you get this huge GE oven?" "Well, dear, at the Appliance Superstore. It's the GE XL44 Gas Range Oven and Jack says it'll cook a turkey even twice his size and I believe him because his motto is 'honesty is spoken here.'"

Right now at the Appliance Superstore it's GE National Appliance Days and Jack's trained staff would love to show you the energy saving GE gas and electric dryers with extra care cycle to minimize wrinkling and sensors to indicate dryness. So it automatically shuts off for you. The appliance Superstore and GE, bringing good things to life.

June - December 1990

19. This music segment is being brought to you by McMillan Realty. For years they've said "Welcome Home" to thousands of satisfied customers. Whether buying, selling or moving up to a brand new home, McMillan Realty can help Temeculans achieve their goals quickly, easily, and professionally. McMillan Realty -- your full-service realtor. Their phone number is 694-0445.

20. "I'm gonna really miss you, dude. You've been the best neighbor I've ever had. How did you ever sell your house so fast?" "Well, you know, we called Dennis Wilson at McMillan Realty and he did a real good job for us. Not only sold our house quickly, but he put us in touch with a realtor in San Francisco where we are moving to." "I want my lawn mower back." Dennis Wilson, McMillan Realty. He can assist you in all your real estate needs. Dennis Wilson's phone number is . . . .

ATTACHMENT 2

April 10, 1992

Hello, this is Frank Wickerson, general manager of Honda of Temecula. I'm happy to announce that according to R.L. Polk & Company's 1991 year end figures Honda is number one in import owner loyalty for the fifteenth year in a row. . . .

Nissan of Temecula (repeated 15 times). The Nissan factory customer satisfaction survey has ranked Nissan of Temecula number one in both sales and service in Southern California. . . .

Hi, I'm Andrew Rappaport representing Honda of Temecula's satisfaction plus award-winning dealership and the winner of Honda's top tech troubleshooting contest.

At Pinky's Bar and Grill every Thursday night is Ladies' Night, starting at 7:30.

January 18-23, 1992

The Honda Civic VX from Honda of Temecula features a new 16-valve fuel injected engine. With its variable valve control system, the Civic VX delivers both horsepower and fuel efficiency. EPA estimated at 51 miles per gallon on the highway and 44 in the city. . . .

The Civics, Accords, and Preludes for 1992 are in at Honda of Temecula. Honda, according to R.L. Polk & Company, is the number one car in import owner loyalty. And it's been that way for the past 14 years. Honda, a name which through the years has become very dependable and reliable to many satisfied owners. . . .

Leasing at Honda of Temecula is available on all models, including this year's Honda Accord. The Accord blends performance, style and luxury along with many standard features. It's Honda of Temecula for Accord leasing. . . .

Hey, Dude, what's the rush? Well, I just got my tax stuff and I've got to get it in the mail so I can get my refund check in two months. No way, Dude! I just called Tax Express and got my express refund in just a couple of days. Well, who would you talk to? Rave and Dee Womack. . . . Tax Express offers one to three days express refund for the refund anticipation loan. . . .

H & R Block's rapid refund program is designed to return refunds as quickly as possible. A loan against an anticipated federal income tax refund is on its way in a matter of days after H & R Block files the return relectronically with the IRS. . . .

Morino and Hunteman, live at Kinko's Copy Center. . . . We've been here since 3:30 this afternoon. . . . Kinko's has 600 stores over 50 states and going into Japan and Europe now. That's 600 stores, a nationwide company, and a location right here in Temecula that is open seven days a week, 24 hours a day . . . . I just wanted to say that we have absolutely the best co-workers in town here. So whether you come by in the middle of the night or in the morning to make a copy or you drop off a big job at 5 p.m. that you need at 5 a.m. we've got the co-workers that can do the job for you. They're wonderful. . . .

Hey, it's Marino and Hunteman on the Morning Show at the Mix, another live broadcast. This time it's from Maria's Tacos on Front Street . . . . We want you to come join us for lunch there. Lunch is next Wednesday, the 29th, 11:30 to 2, a long lunch, we call it the Temecula lunch. Again, that's Maria's Tacos. They do marinated burritos and they have tacos and combination plates and quesadillas, which I eat all the time. It's another live broadcast. We'll see you there for lunch.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

GTE AIRFONE INCORPORATED — File No. I-T-C-92-238

For authority Pursuant to
Section 214 of the
Communications Act of 1934,
as amended, and to obtain
and use Inmarsat Aeronautical
Mobile Satellite Services

MEMORANDUM, OPINION, ORDER AND AUTHORIZATION

Adopted: December 18, 1992 Released: December 31, 1992

By the Chief, International Facilities Division:

1. On August 12, 1992, GTE Airfone Incorporated (GTEAF) filed an application pursuant to Section 214 of the Communications Act of 1934, as amended, for authority to obtain and use Inmarsat aeronautical mobile satellite services (AMSS) in connection with its provision of International Message Telecommunications Service (IMTS) between the United States and international points. The application was placed on public notice on August 19, 1992, and no oppositions were received.

2. GTEAF requests authority to use Inmarsat AMSS as provided by Comsat over Comsat's facilities. GTEAF will use these facilities in conjunction with GTEAF's provision of switched message services to serve the needs of GTEAF's in-flight telephone service customers. GTEAF currently provides IMTS to users of its Airfone in-flight telephone service by reselling the international switched message telephone services of AT&T.[1] Under the instant proposal, calls would be made to various points within the U.S. and various points in international countries from aircraft outside U.S. airspace.[2] Comsat will provide GTEAF with connections to the public switched network to route calls to their destinations. GTEAF will acquire service from Comsat pursuant to a carrier-to-carrier agreement that was filed at the Commission on April 17, 1992. GTEAF states that accounting will be performed consistent with any Commission Rules applicable to air-ground radiotelephone services provided by non-dominant carriers such as GTEAF. Charges and regulations governing the service will be established by tariff filings to the extent required by law. GTEAF further states that the rates will be just, reasonable, non-discriminatory, and cost-based. According to GTEAF, grant of this application will serve the public interest because it will enable GTEAF to provide international service to customers on airplanes beyond the line-of-sight limitations of GTEAF's 800 MHz radio system.[3]

3. Based on the foregoing, we conclude that it will be in the public interest to grant GTEAF authority to obtain and use Inmarsat aeronautical mobile satellite services in connection with its resale of International Message Telecommunications Service from aircraft in international flight (*see* n.2) to the United States and international points.

4. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, that the application of GTE Airfone Incorporated, File No. I-T-C-92-238, IS GRANTED and GTEAF is authorized to provide Aeronautical Public Correspondence and Aeronautical Administrative Control services through the Inmarsat aeronautical system from aircraft in international flight (*see* n.2) to various points within the U.S. and to international points to which GTEAF has been authorized to provide IMTS on a resale basis (*see* n.1) by the resale of Comsat's Inmarsat AMSS pursuant to the carrier-to-carrier contract filed on April 17, 1992, provided that the services GTEAF obtains from Comsat be generally available to similarly situated customers at the same terms, conditions, and rates.

5. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that GTEAF shall file and have in effect a tariff for the service authorized in this order before offering services to the public.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] GTEAF was authorized to provide IMTS on a resale basis in GTE Airfone, Inc., 6 FCC Rcd 6938 (1991).

[2] The Commission authorized the use of Inmarsat AMSS through Comsat via U.S. aeronautical earth stations for aircraft in flight (1) from the U.S. to a foreign point, (2) from a foreign point into the U.S., and (3) between any two foreign points. Aeronautical Radio, Inc., 7 FCC Rcd 1006 (1992).

[3] GTE Airfone, Inc., 6 FCC Rcd 4435 (1991).

Before the
Federal Communications Communication
Washington, D.C. 20554

In the Matter of

H.G.M. COMMUNICATIONS, INC. File No. ITC-92-250

For Authority Pursuant to Section 214 of the Communications Act of 1934 to Establish Channels of Communication between the U.S. and INTELSAT Atlantic and Pacific Ocean Region Satellites for the Provision of INTELSAT Business Service and International Video Service.

ORDER AND AUTHORIZATION

Adopted: December 16, 1992; Released: December 31, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require the provision of INTELSAT Business services (IBS) and International Video Service by H.G.M. Communications, Inc. (H.G.M.).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-250 IS GRANTED, and H.G.M. is authorized to establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites for the provision of IBS and International Video Service between the U.S. and countries listed in Comsat's Tariff F.C.C. No. 103 for the space segment of IBS and International Video Service.[1]

3. IT IS FURTHER ORDERED that the authority granted herein for H.G.M. to establish channels of communication between the earth stations in the U.S. and the INTELSAT satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

4. IT IS FURTHER ORDERED that our authorization for H.G.M. to provide private lines is limited to the provision of such private lines only between the U.S. and those countries listed in Comsat's Tariff F.C.C. No. 103 respectively -- that is, private lines which originate in the U.S. and terminate in those countries or which originate in those countries and terminate in the U.S. In addition, H.G.M. may not -- and H.G.M.'s tariff must state that H.G.M.'s customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that its correspondents afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further NPRM*, FCC 92-517, Released November 27, 1992.

5. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies controlling it or controlled by it shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling it or controlled by it are parties.

6. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

7. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between H.G.M. and its correspondents, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

8. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

9. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

10. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of this Order's public notice date (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] On October 26, 1992, the applicant withdrew that portion of its application relating to the provision of IDR services.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 4602
Tariff F.C.C. No. 2

ORDER

Adopted: December 23, 1992; Released: December 23, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On November 19, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective December 24, 1992. This filing modifies cancellation provisions for AT&T's 800 Customer Specific Term Plan II.

2. On December 4, 1992, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal No. 4602.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4602 and MCI's petition. We conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 4602, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ACC LONG DISTANCE CORP.
Complainant,

v. File No. E-91-94

YANKEE MICROWAVE, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 1992; Released: January 4, 1993

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this order, we address a complaint filed by ACC Long Distance Corp. (ACC) on April 11, 1991, against Yankee Microwave, Inc. (Yankee), a non-dominant specialized common carrier. Among other relief, ACC seeks a declaratory ruling that nontariffed rates contained in a 1985 contract between Yankee and a former Yankee customer were patently unlawful under Sections 201(b) and 202(a) (of the Communications Act, 47 U.S.C. §§ 201(b), 202(a).[1] For reasons discussed below, we deny ACC's complaint.

II. BACKGROUND

2. On or about January 31, 1985, Yankee and Petricca Communications Systems, Inc. (Petricca) entered into a written agreement for digital microwave service (hereinafter the Petricca contract)[2] which contained the rates here challenged by ACC.[3] Petricca's business subsequently was acquired by ACC Corp., ACC's parent company.[4] Pursuant to the asset purchase agreement between ACC Corp. and Petricca, ACC Corp. acquired substantially all of Petricca's assets and liabilities except the Petricca contract. Petricca received service and made the monthly payments called for under that contract, beginning in February 1987 until September 1988 when it ceased making such payments.[5]

3. Early in 1990, Yankee filed suit against ACC Corp., ACC, Petricca and others in the United States District Court for the District of Massachusetts (hereinafter the federal court) alleging, among other claims, violations of the Racketeer Influenced and Corrupt Organization (RICO) statute, breach of contract and interference with contractual relations based upon Petricca and ACC's failure to honor the Petricca contract.[6] On April 4, 1991, following discovery in that proceeding, ACC petitioned this Commission to deny eight applications Yankee had filed for renewal of microwave licenses for its digital microwave system between Pittsfield, Massachusetts, various points in Massachusetts and Glastonbury, Connecticut. ACC alleged that Yankee had obtained its authorizations through a pattern of fraudulent conduct and had violated various Commission rules.[7] A few days later, on April 11, 1991, ACC filed the complaint here before us, repeating many of the same allegations that it had raised initially in its petition to deny.

4. On January 8, 1992, the federal court entered summary judgment in favor of the defendants on the RICO count as well as on mail fraud and securities fraud counts.[8] It also dismissed Yankee's claims of breach of contract and various other alleged violations of Massachusetts' law because of lack of subject matter jurisdiction.[9] Yankee then filed an action for breach of contract and other claims

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[1] Section 201(b) states that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate] communication service, shall be just and reasonable ...."

Section 202(a) makes it unlawful for a common carrier "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service ...."

[2] A copy of the Petricca contract, as amended on April 24, 1985, is attached to Yankee's Answer filed July 1, 1991, at Tabs 4,5.

[3] Under the Petricca contract, Yankee would have received approximately four million dollars over a six year term, which represented approximately $40,000 less per month than the rates Petricca then was paying AT&T for analog service.

[4] Petricca provided long distance telephone services to customers in the Pittsfield, Massachusetts area.

[5] Under the Petricca contract, Petricca had the option to discontinue service prior to the expiration of the contract's six-year term by fulfilling specified conditions. However, after receiving service for only eighteen months, Petricca discontinued service without complying with such conditions. *See* Petricca contract at 6. (If service discontinued by customer before end of agreed term, customer liable for contract price, reduced by 1/72 for each month of use for which payment received).

[6] Yankee Microwave, Inc. v. ACC Corp., No. 90-10296-WD (D. Mass. Feb. 2, 1990).

[7] On May 28, 1992, ACC's petition was denied and a limited renewal period was imposed by order of the Chief of the Bureau's Domestic Facilities Division. In the Matter of Applications of Yankee Microwave, Inc. for Renewal of licenses for Point-to-Point Microwave Service Stations WLC 405, Pittsfield, MA, *et al.*, 7 FCC Rcd 3233 (Com.Car.Bur. 1992) (*License Renewal Order*), *petition for reconsideration filed*. After the close of the record in the instant proceeding, ACC filed a motion seeking leave to file a "Request for Sanctions," alleging that Yankee made representations in the *License Renewal* proceeding that directly contradict its answers to certain interrogatories in this proceeding. The proper proceeding for issues concerning alleged misrepresentations in filings with the Commission, appropriate sanctions, if any, in that connection, and the continued fitness of Yankee to be a licensee of the Commission is the pending *License Renewal* proceeding. Accordingly, ACC's motion for leave to request that we consider sanctions in the instant proceeding is denied.

[8] *See* enclosure to letter from A. Kimberly Matthews to Adrien R. Auger (Jan. 17, 1992).

[9] *Id.*

against ACC and Petricca in the Superior Court for Berkshire County, Massachusetts (the state court).[10] On May 27, 1992, the state court granted a motion filed by the defendants to stay the action before it "until such time as the Federal Communications Commission shall, by approval of a tariff filed by [Yankee] or otherwise, have determined the level of 'just and reasonable' rates that [Yankee] is permitted to charge [Petricca] for common carrier microwave transmission services."[11]

5. In a series of decisions beginning in 1980, the Commission altered its focus with respect to regulatory oversight of common carriers classified as "non-dominant."[12] The economic underpinning of its policy streamlining regulatory procedures for non-dominant carriers "flows from the fact that firms lacking market power simply cannot rationally price their services in ways which, or impose terms and conditions which, would contravene Sections 201(b) and 202(a) of the Act."[13] Accordingly, in its *First Report and Order*, the Commission affirmed its decision to consider tariffs of non-dominant carriers to be "presumptively lawful."[14] It classified certain carriers offering microwave transmission services such as Yankee as "specialized common carriers."[15] The Commission concluded that such specialized common carriers lacked the market power to raise prices substantially above costs.[16] In addition, it concluded that the increase in competition to such carriers, arising from the growing number of microwave and fiber optic providers, would act as a natural market restraint on prices. Accordingly, the Commission concluded that strict regulation of such non-dominant carriers was unnecessary and failed to serve the public interest.[17]

6. In 1983, the Commission permitted specialized common carriers to offer service without having to file FCC tariffs.[18] Under such "forbearance" regulation, non-dominant carriers were permitted, but not required, to file FCC tariffs, at the carrier's option. The rationale for this decision was to remove unnecessary regulatory burdens on non-dominant carriers to promote greater competition, lower rates, and increased availability of service.[19] Carriers treated by forbearance remained subject to the obligation to charge just, reasonable, and non-discriminatory rates under Sections 201-202, and to the Section 208 complaint process.[20]

7. ACC contends that the facts of record in this proceeding discredit the Commission's conclusion that non-dominant carriers cannot rationally price their services in contravention of Sections 201(b) and 202(a). ACC contends that Yankee charged "grossly excessive rates to Petricca ... [and provided] identical services to others at dramatically reduced rates."[21] Among other relief sought,[22] ACC asks the Commission to: (1) "abrogate" portions of the Petricca contract;[23] (2) direct Yankee to file tariffed rates for service between Pittsfield, Massachusetts and Boston, Massachusetts, between Pittsfield and Worcester, Massachusetts, and between Pittsfield and Glastonbury, Connecticut, as allegedly required under the Petricca contract; (3) prescribe "the rates that Petricca should have been charged between February 1, 1987 and August 1988"; and (4) order Yankee to refund payments made by Petricca "in excess of the prescribed rate." (footnotes omitted).[24]

III. DISCUSSION

8. We turn first to ACC's request that the Commission order Yankee to file a tariff of its rates between points in Massachusetts and between Pittsfield, Massachusetts and Glastonbury, Connecticut. Initially, we note that, except in respects not here relevant, the Commission does not have jurisdiction over rates for intrastate service.[25] Insofar as interstate service is involved, Yankee's president and sole owner advised in May 1992 that due to an accumulated deficit exceeding $2 million, "Yankee is planning to cease operations on its digital [microwave] system within the next few months."[26] On December 11, 1992, Yankee surrendered its licenses for its digital microwave system for all but its Boston, Massachusetts to Providence, Rhode Island leg and advised the Commission that service on that leg was scheduled to cease in mid-January, 1993, at which time Yankee would request deletion of the remaining licenses

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[10] Yankee Microwave, Inc. v. ACC Corp. et al., Superior Court, No. 92-0065.

[11] *See* enclosure to letter from Russell D. Lukas to Thomas D. Wyatt (May 28, 1992).

[12] *See* In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 85 FCC 2d 1 (1980) (hereinafter *First Report and Order*).

[13] *Id.* at 31.

[14] *Id.* at 33.

[15] *Id.* at 28.

[16] *Id.* at 10, 21. We note that the Massachusetts Department of Public Utilities (DPU), in certifying Yankee as a non-dominant carrier, similarly concluded that Yankee lacked market power to set intrastate rates significantly above costs. DPU order of Sept. 1, 1989 at 10-11 (copy attached at Tab 9 of Yankee's Answer).

[17] *See First Report and Order*, 85 FCC 2d at 30-31.

[18] Competitive Common Carrier, 95 FCC 2d 554 (1983) (hereinafter *Fourth Report and Order*), *vacated*, AT&T v. FCC, No. 92-1053, slip op. at 18 (D.C. Cir. Nov. 13, 1992). The Court of Appeals has withheld the issuance of its mandate until seven days after the disposition of any timely petition for rehearing. The Commission has announced that it will petition for such rehearing. Public Notice, Tariff Filing Requirements for Interstate Common Carriers, FCC 92-525 (Nov. 25, 1992).

[19] *Fourth Report and Order*, 95 FCC 2d at 579-80.

[20] *Id.* at 556.

[21] Reply Brief for Complainant, filed August 5, 1992, at 3.

[22] ACC seeks a declaratory ruling that "[a]s a direct consequence of a pattern of fraudulent conduct, Yankee obtained [certain authorizations], when there was absolutely no public need or potential customers for the transmission services." Complaint at 46. Such allegation was addressed and denied in the *License Renewal Order*.

[23] The contract provisions that ACC seeks to have abrogated concern, *inter alia*, revised charges agreed upon by Petricca and Yankee for the amended service order. *See* Complaint at 49 and at Tab 9.

[24] *Id.* at 49.

[25] 47 U.S.C. § 152(b) provides, in pertinent part, that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communication service by wire or radio of any carrier...." (emphasis added).

[26] Declaration of Bernard E. Karlen (Tab 1 of Brief) at 4. *See also* Brief at 43 (Yankee is unable to continue its digital microwave business).

for its digital system.[27] Under these circumstances, it appears that Yankee may discontinue its interstate digital services and, accordingly, we will not order Yankee to tariff such an offering.[28] However, should Yankee choose to continue offering interstate digital services, it will be subject to the provisions of Section 203 of the Communications Act, applicable Commission rules and orders in implementation thereof, and any further orders of the Commission with respect to non-dominant carriers pursuant to *AT&T v. FCC, supra.*

9. ACC is correct that the Commission's authority to adjudicate complaints filed pursuant to Section 208 of the Act against common carriers covers those alleging that nontariffed interstate contract rates charged by a non-dominant carrier were unlawful.[29] ACC also is correct that the Commission could prescribe future rates if it found existing rates were unjust or unreasonable, in violation of Section 201(b), or unreasonably discriminatory, in violation of Section 202(a) of the Act.[30] Moreover, under Section 209 of the Act, the Commission has authority to award damages in such adjudicatory proceedings to any party complainant that it determines "is entitled to an award of damages under the provisions of this Act ...." However, to the extent that ACC's complaint is in substance a request for a ruling that unreasonable rates were charged and damages are due to Petricca, the complaint is barred by the Communications Act. As Yankee has noted, Petricca is not a party to this proceeding and did not complain about the rates, including termination charges, in the Petricca contract to which Petricca was a party.[31] Moreover, under Section 415(b), the applicable statute of limitations, a complaint for damages with the Commission is barred after two years even if the interstate rates set by the Petricca contract between February 1, 1987 and August 1988 had contravened provisions of the Act. The statute of limitations contained in Section 415 of the Act is not discretionary and the lapse of time beyond the two-year limitations period not only bars the remedy but also destroys the liability. *Armstrong Utilities, Inc. v. General Telephone Co. of Pa.*, 25 FCC 2d 385, 390 (1970); *see Midstate Horticultural Co. v. Pennsylvania R. Co.*, 320 U.S. 356, 363-64 (1943); *Municipality of Anchorage v. Alascom, Inc.*, 4 FCC Rcd 2472, 2473 (1989). Similarly, although ACC was not a party to the Petricca contract, it also is barred from seeking damages based on the rates set therein. Indeed, ACC recognizes that any refund of the rates paid by Petricca could be refunded only to Petricca and states that "ACC has never sought 'the recovery of damages' from Yankee."[32]

10. Moreover, while ACC is correct that the Commission may prescribe rates to take effect in the future, ACC is mistaken in asserting that the Commission may "retrospectively apply the rates it prescribes...."[33] Even if the Commission were to determine that rates in the Petricca contract had contravened Sections 201 and 202 of the Act, it could not lawfully prescribe rates having a retroactive effect. The Commission's authority to determine and prescribe just and reasonable rates derives from Section 205 of the Act which authorizes rates to be prescribed only on a prospective basis.[34] ACC's reliance on the *Sierra-Mobile* doctrine[35] and *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1504 (D.C.Cir. 1987) is misplaced. The Supreme Court made clear in *FPC v. Sierra Pacific Power Co.* (which involved statutory provisions similar to Section 205 of the Communications Act) that the Federal Power Commission's power to prescribe a change in contract rates whenever it determines such rates to be unlawful "is limited to prescribing the rate 'to be thereafter observed' and thus can effect no change prior to the date of the order...."[36] Accordingly, we deny ACC's request for an order "prescribing the rates that Petricca should have been charged between February 1, 1987 and August 1988 ...."[37]

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[27] Letter from A. Kimberly Matthews to Donna R. Searcy (Dec. 11, 1992). *See also* letter from John D. Pellegrin to Adrien R. Auger (Dec. 11, 1992).

[28] In 1982, the Commission streamlined its regulation under Section 214 of the Act with respect to certain non-dominant carriers so that such carriers could exit the domestic market merely by giving 30 days' notice to their customers and showing that reasonable substitute service was available. Competitive Common Carrier Services, Second Report and Order, 91 FCC 2d 59, 60 (1982). Such streamlined regulation subsequently has been extended to cover other non-dominant carriers, such as Yankee. Fifth Report and Order, 98 FCC 2d 1191, 1192 (1984); Section 63.71 of the Commission's rules, 47 C.F.R. § 63.71. Further, under Section 61.58(b) of the Commission's rules, any new tariffed rate schedules that Yankee might file with the Commission could not become effective until after at least 14 days' notice. 47 C.F.R. § 61.58(b).

[29] In recognizing "the potential for marketplace failures" and possibility of "irrational carrier conduct or aberrations," the Commission indicated that it would entertain bona fide complaints against certain non-dominant carriers. Second Report and Order, *supra*, 91 FCC 2d at 70.

[30] ACC cites no precedent, nor are we aware of any case, where the Commission prescribed rates to be charged by a carrier that it had classified as "non-dominant" or not possessing market power.

[31] As previously noted (para. 2, *supra*), ACC did not acquire the Petricca contract when it acquired Petricca's business.

[32] Complaint at 16, n.41.

[33] *Id.* at 50, n.143.

[34] Ohio Bell Telephone Co. v. FCC, 949 F.2d 864, 867 (6th Cir. 1991) (relief authorized by Section 205 is prospective only). Section 205(a) provides, in pertinent part, as follows: "the Commission is authorized and empowered to determine and prescribe *what will be* the just and reasonable charge ... *to be thereafter observed* ..." (emphasis added).

[35] *See* FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353-55 (1956); United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, 344 (1956).

[36] FPC v. Sierra Pacific Power Co., 350 U.S. at 353. *See also* concurring opinion of Judge Starr in AT&T v. FCC, 836 F.2d 1386, 1395 (D.C.Cir. 1988) (Section 205 gives FCC "power to prescribe just and reasonable charges *for the future*.") (emphasis in original).

[37] Complaint at 49. ACC's reliance on Section 4(i) of the Act, New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101, 1106-9 (D.C. Cir. 1987), and American Tel. & Tel. Co. v. FCC, 836 F.2d 1386, 1392 (D.C. Cir. 1988) as authority to order refunds to remedy earnings in excess of the lawful rate is misplaced. In those cases, unlike the instant case, the Commission previously had prescribed maximum rates of return which it then found had been unlawfully exceeded. Nor is Chesapeake & Potomac Telephone Co. of Md., 2 FCC Rcd 3528, 3532 (1987), authority for ACC's assertion that the Commission "can retroactively apply the rates it prescribes pursuant to this complaint." Complaint at 50, n.143. That case involved a carrier's backbilling of its applicable interstate and legally effective FCC-tariffed rate, not retroactive ratemaking by the Commission.

11. While ACC's complaint to this Commission is thus denied, the issue of the reasonableness of the rates in the Petricca contract is pending before the state court. We have examined the evidence before us concerning ACC's contention that the interstate rates that Yankee charged Petricca between February 1, 1987 and August 1988 were patently unlawful under Sections 201(b) and 202(a) of the Act. Yankee has denied all allegations that the challenged contract rates violated any provision of the Communications Act or the Commission's rules.[38] The burden is not on Yankee to show that the challenged rates were lawful. Rather, the burden is on ACC to show that they were not.[39] For reasons discussed below, we conclude that ACC has not sustained that burden.[40]

12. The record supports findings urged by Yankee that Petricca sought to lock-in, for a six-year term, rates that were 40% lower than those it was then paying AT&T, and that the Petricca contract "was entered into between two not-unequal bargaining parties in a competitive market where alternative service providers existed, and ... represented a good deal for Petricca based on the price it was then paying AT&T for microwave transmission service and its forecast of future price trends ..."[41] That contract bound both parties. On the other hand, the record does not support ACC's assertions that Yankee allocated to Petricca all costs associated with its digital network or all costs for the facilities used by Petricca.[42] Based on the entire record, ACC has not persuaded us that the Petricca contract rates were not reasonably related to Yankee's actual costs. Nor has ACC shown, especially in light of the fact that the Petricca contract rates were substantially lower than the rates Petricca was being charged by AT&T when it replaced AT&T with Yankee as its service provider, and the further fact that AT&T's rates as well as those of Yankee subsequently both were reduced, that the Commission's regulatory policies did not work here as the Commission had anticipated.

13. We do not agree with ACC that Yankee should be estopped from charging individual case basis (ICB) rates merely because it had previously represented, in sets of applications granted in 1984 and 1985, that its proposed digital microwave services would be furnished pursuant to tariffed charges. ACC has not shown that Yankee's representations in this regard were "fraudulent," as it contends.[43] Yankee made those representations long before it advised Petricca, in 1987, that it was availing itself of its option not to tariff its interstate charges for such services,[44] consistent with the Commission's orders.[45] Yankee relied on the Commission's longstanding forbearance orders in choosing not to tariff its interstate rates between February 1987 and August 1988.[46] In the *Fourth Report and Order*, the Commission permitted non-dominant carriers such as Yankee to operate without FCC tariffs.[47] ACC has not persuaded us that we should have singled out Yankee for disparate treatment or that the public interest would have been served if we had required these services to be offered under tariff during the relevant period. Further, the parties to the Petricca contract were mistaken in their belief that filing an FCC tariff would be "permissible and proper ..."[48] because Yankee was then on notice that it would not be allowed to tariff its rates.[49]

14. ACC further contends that, insofar as Yankee's rates to Petricca were based on ICB pricing, they were unlawful under Section 201 of the Act.[50] However, the Commission never has said that such pricing is unlawful *per se*. While the Commission has presumed that ICB pricing is "discriminatory" and "not justified in perpetuity" when a carrier has sufficient experience with a service to develop general or averaged rates, the Commission found, in a case relied upon by ACC, the use of ICB rates, even by dominant carriers, to have been "an appropriate transitional mechanism ...."[51]

15. ACC argues that Yankee engaged in unjust discrimination by offering rates in subsequent contracts that were lower than the rates negotiated in the Petricca contract. We disagree. Section 202(a) requires carriers to make their

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[38] Answer at 61.

[39] Under Section 208 of the Communications Act and Section 1.720(b) of the Commission's rules, the burden of proof is on ACC to show, as it alleges, that the contract rates Yankee charged Petricca were unlawfully high or unreasonably discriminatory.

[40] ACC is concerned about the probative value of certain interrogatory answers concerning Yankee's expense figures. For reasons specified herein, we are denying Yankee's request for an affirmative ruling that its past rates were just and reasonable under Section 201 of the Act. (*See* Reply Brief for Defendant at 33-4, n.71). The facts that are of decisional significance to our decision herein are undisputed and, thus, can be resolved on the basis of the pleadings without resort to a trial-type hearing.

[41] Reply Brief for Defendant at 3 (Aug. 5, 1992). Petricca had been a resale carrier since 1982, providing voice and data services. *See id.* at 6.

[42] *See id.* at 6-8.

[43] Complaint at 39.

[44] *See* letter of Jeffrey L. Sheldon to Basil A. Petricca (Jan. 27, 1987) at 2 (copy attached to Complaint at Tab 15) ("Yankee has elected to offer its digital ... services on a nontariffed, private contract basis....").

[45] In concluding that forbearance rules for nondominant carriers would be desirable, the Commission found that application of traditional tariff filing requirements to nondominant carriers would inhibit price competition, service innovation, and the ability of firms to respond quickly to market trends. Second Report and Order, *supra*, 91 FCC 2d at 65.

[46] Whether Yankee's election not to tariff its interstate rates at the FCC constituted a breach of its contract under Massachusetts law is an issue properly before the state court. Nevertheless, even if the result of such election should be determined to constitute a breach of the Petricca contract, that, in and of itself, would be insufficient to show a violation of either Section 201 or Section 202 of the Act.

[47] 95 FCC 2d at 557.

[48] Petricca contract at 8.

[49] Competitive Common Carrier Services, Sixth Report and Order, 99 FCC 2d 1020, 1034 (1985) (new tariffs of non-dominant carriers that do not currently have any tariffs on file will not be accepted by the Commission.) It was not until August 9, 1985, well after execution of the Petricca contract, as amended in April 1985, that such order was vacated in relevant part. MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C.Cir. 1985).

[50] Complaint at 40.

[51] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, 4 FCC Rcd 8634, 8642 (1989). We note that intrastate tariffs filed by Yankee with the Massachusetts DPU, including provisions for filing ICB rates, were approved, as amended. *See* DPU order of September 1, 1989 at 2, 4-6, 10 (copy attached to Yankee's Answer at Tab 9).

rates generally available to all similarly situated customers. The record here indicates that Yankee complied with Section 202(a) by making the rates negotiated in subsequent contracts available to all comers, including ACC.[52] Moreover, the United States Court of Appeals for the District of Columbia Circuit has held that nothing in Section 202 requires carriers to renegotiate their private contractual agreements to allow customers to avail themselves of lower rates so long as there is a "neutral rational basis" underlying the disparate charges."[53] In this case, the fact that Yankee had to construct facilities in order to fulfill the Petricca contract and the fact that Yankee's generally available rates steadily declined from the time of the Petricca contract to the time of the subsequent contracts constitute a neutral rational basis for the rate disparity. Accordingly, we find that no Section 202(a) violation has occurred.

IV. CONCLUSION

16. In view of the foregoing, we conclude that ACC has not met its burden of showing that Yankee violated Section 201 or Section 202 of the Act. Nor has ACC shown that the Commission can or should grant any of the relief ACC requested in its complaint that was not addressed in the *License Renewal Order*.[54]

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 208, and authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned complaint filed by ACC Long Distance Corp. on April 11, 1991 IS DENIED.

18. IT IS FURTHER ORDERED that ACC's request for issuance of a declaratory ruling that rates in a 1985 contract between Yankee and Petricca were unlawful under Sections 201 and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201, 202, IS DENIED.

19. IT IS FURTHER ORDERED that ACC's "Motion For Leave to File Request for Sanctions," filed October 27, 1992, IS DENIED.

20. IT IS FURTHER ORDERED that Yankee's request for an affirmative finding that its rates for the period February 1987 - September 1988 were just and reasonable IS DENIED.

21. IT IS FURTHER ORDERED that the Chief, Formal Complaints and Investigations Branch, shall send a copy of this Order to the Honorable Daniel A. Ford, Justice of the Superior Court for Berkshire County, Massachusetts.

22. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

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[52] *See* Reply Brief for Defendant at 23-26.

[53] Reservation Telephone Cooperative v. FCC, 826 F.2d 1129, 1135-36 (D.C. Cir. 1987) (court upheld Commission decision stating that AT&T was not obligated to renegotiate a private contract with a local telephone company even though the contract rates were higher than those of subsequent contracts). The court's decision was based, in part, on its finding that the Act's purpose is "to protect the public interest rather than to provide a forum for the settlement of private disputes." *Id.*, *citing*, United Telephone Co. of the Carolinas v. FCC, 559 F.2d 720, 723 (D.C. Cir. 1977). In this case, it appears that ACC is claiming discrimination in an attempt to void what it perceives, with the benefit of hindsight, to have been an improvident private contract."

[54] Even if the Commission could "abrogate" provisions of the Petricca contact containing the applicable charges and other conditions of service, ACC has failed to show that the Communications Act supports such action.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-305

In the Matter of

Amendment of the rules	RM-8066
relating to permissible	RM-8067
uses of the vertical	
blanking interval of broadcast	
television signals	

NOTICE OF PROPOSED RULE MAKING

Adopted: December 18, 1992; Released: December 31, 1992

Comment Date: March 1, 1993
Reply Comment Date: March 16, 1993

By the Commission:

INTRODUCTION

1. By this *Notice of Proposed Rule Making*, we propose to amend Sections 73.682 and 73.699 of our rules to permit optional transmission of expanded closed-captioning[1] and other types of information using all of line 21, field 2, of the vertical blanking interval of broadcast television signals. We also propose to reserve use of line 19 of the vertical blanking interval for the optional use of a ghost-cancelling reference (GCR) signal.

BACKGROUND

2. On July 7, 1992, the Consumer Electronics Group of the Electronic Industries Association (EIA/CEG[2]) filed a Petition for Rule Making (EIA/CEG Petition) seeking designation of line 21, field 2 of the vertical blanking interval for enhanced closed-captioning services. This petition was filed in response to an invitation made by the Commission in the *Report and Order* (*Order)* in Gen. Docket No. 91-1[3] in which the Commission noted that Public Broadcasting Service/National Captioning Institute (PBS/NCI) specifications permit two distinct channels of captioning information to be transmitted, either to caption in two different languages or for two different reading levels. However, comments received indicated that the current (captioning) data rate is insufficient to caption two channels simultaneously, but that this problem could be resolved if all of line 21, field 2 could be used.[4] The Commission indicated that assigning the second half of line 21, field 2 for closed-captioning was outside the scope of that proceeding and that the views of a broader range of commenters (such as broadcasters, cable operators and video programmers) should be sought in the matter. Accordingly, we invited EIA/CEG or other interested parties to file such a petition.[5] EIA/CEG responded to that request.

3. In addition, on August 14, 1992, the United States Advanced Television Systems Committee (ATSC)[6] filed a Petition for Rule Making (ATSC Petition) which requests that Section 73.682(a)(21)(iv) of the Commission's Rules be amended to substitute a GCR signal on line 19 of the NTSCH[7] vertical blanking interval, in place of the vertical interval reference (VIR) signal for which that line is currently reserved.

4. Because each of the petitions mentioned above is directed at improving the quality of television service through new or modified uses of the vertical blanking interval, and because neither of the two petitions appears to involve any significant technical difficulty, we believe that a consolidated rulemaking proceeding would expedite their resolution and facilitate introduction of these new technologies to the American public.

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[1] Closed-captioning is the video display of aural program material in a textual format. This process primarily benefits deaf or hearing-impaired individuals. Pursuant to §73.682(a)(22), closed-captioning information may be transmitted on line 21, field 1 and the first half of line 21, field 2 of the vertical blanking interval. Standard television pictures are transmitted at a rate of 30 frames per second, with two interlaced fields comprising each frame. Each field begins with a vertical blanking interval of twenty-one lines, during which the picture scanning beam is turned off (blanked) and is moved from the bottom of the screen to its starting position at the top of the screen. Thus, there are two vertical blanking intervals transmitted per frame, one in each field. The placement of data within the vertical blanking interval is described in terms of the particular blanking line used and the field (one or two) in which it occurs.

[2] EIA/CEG's membership includes most of the world's large consumer electronics manufacturers as well as smaller companies that produce, import, distribute, sell and service electronic products.

[3] *Amendment of Part 15 of the Commission's Rules to Implement the Provisions of the Television Decoder Circuitry Act of 1990*, 6 FCC Rcd 2419, (1991). Briefly stated, the action taken in that proceeding requires that all television broadcast receivers with picture screens 13 inches or larger shipped in interstate commerce, manufactured, assembled or imported from any foreign country into the United States after June 30, 1993, must be equipped with a closed-captioning decoder. The Act (as implemented in 47 C.F.R. §15.119) requires only that line 21, field 1 be decoded. Therefore we are not proposing that TV receivers subject to the Act be equipped with enhanced closed-captioning decoders. However, we believe that the prompt action we are taking on EIA/CEG's petition will provide TV manufacturers with an opportunity to produce as many receivers as possible with enhanced closed-captioning decoding capability.

[4] *Id.*, at 2431.

[5] *Id.*

[6] ATSC is a private-sector organization whose charter and terms of reference provide for the voluntary standardization of advanced television technologies. Its membership is broadly constituted among the industries most affected by advanced television: broadcasting, cable, satellite, manufacturing and motion picture production.

[7] The current U.S. television system is referred to as the NTSC system, named for the National Television Systems Committee that advised the Commission on television technical standards in the '40s and '50s.

The Petitions

5. *Line 21.* Since the issuance of the *Order,* EIA/CEG states that it has been working with receiver manufacturers, decoding circuitry manufacturers, program providers, caption providers and other organizations to arrive at a substantial consensus on the best use of line 21, field 2. As a result of these discussions, EIA/CEG concludes that all of line 21, field 2 should be made available for additional captioning channels as well as an "extended data service" that could include program identification, program schedules and other information that could be valuable to all consumers, including but not limited to people with hearing disabilities. Under this proposal, caption information would continue to have priority, as the present rules already specify in the case of field 1, but other data could be carried on a "space available basis."

6. EIA/CEG notes that the second half of line 21, field 2 is currently unavailable for use by caption and other data services and that the format currently specified for the first half of field 2 is not used by the decoding circuitry that is being incorporated in television receivers or by existing stand-alone decoders.[8] It proposes that the same data format be used for field 2 as has already been established for field 1.[9]

7. *Line 19.* In support of its petition, ATSC notes that while VIR provisions were adopted by the Commission in 1974 to facilitate automatic color adjustments in TV receivers, effective implementation of the VIR signal within the broadcast and receiver manufacturing industries did not occur to a sufficient extent that cognizable benefits were provided to consumers. This was due largely to advances made in chroma circuitry based on the regular color burst signal. ATSC indicates that only one manufacturer, General Electric, produced any significant quantity of VIR-equipped receivers and that such production ceased in 1985. ATSC believes that few such receivers remain in use and that they are capable of continued satisfactory operation in the absence of the VIR signal.

8. ATSC contends that further reservation of line 19 for VIR signals represents inefficient use of vertical blanking interval capacity and that the public interest would be better served by the introduction of ghost-reduction circuitry. Therefore, it believes that GCR signals should replace the VIR signal on line 19. While ATSC requests that transmission of the GCR signal be at the option of the broadcaster, it asks the Commission to adopt the specific ghost-cancelling system developed by Philips Laboratory (Philips).

Discussion

9. We believe the objectives and rationale presented in both the EIA/CEG Petition and the ATSC Petition have merit. Of particular importance in the former petition is the fact that the first half of line 21, field 2 has not been utilized in its current technical configuration. We agree with the petitioner that reconfiguration of line 21, field 2 to provide enhanced closed-captioning (whether it be for a second language or a higher level of captioning quality) would appear to serve the public interest. This change can not only enhance closed-captioning for hearing-impaired persons, but also expand various captioning uses for non hearing-impaired persons as well. We also believe that EIA/CEG's proposed distinction in the priority of use (with non-captioning uses permitted only on a secondary basis) of line 21 may be appropriate.

10. The second half of line 21, field 2 is ostensibly in the visible portion of the TV signal. We believe that this is not cause for concern, however, because the scanning beam in every TV receiver available to date "overscans" the visible picture by several lines on the top and the bottom of the screen.[10] Line 22 (also part of the active video) has been used for several years for program source identification signaling. Since initiation of this use, no complaints of picture degradation have been received.

11. In sum, both EIA/CEG's petition and our own experience indicate that there is no likely adverse impact if we assign all of line 21, field 2 for enhanced closed-captioning and, on a secondary basis, other broadcast-related uses. We seek comment on the specific rule changes in attached Appendix A or on any unforseen or overlooked problems or circumstances that exist which would argue for or against this proposal for the use of line 21, field 2. We also solicit comments on whether or not any adverse interaction may occur between line 21 and line 22 from the standpoint of line identification and decoding circuitry. If so, should the Commission make use of line 22 (which is used for "special signals"[11]) secondary to line 21?

12. Also, the National Captioning Institute (NCI), in comments filed in response to EIA/CEG's petition, supports the concept of an extended data service but recommends that the terms "captions," "text" and "extended data service information" in the proposed rule be defined in order to clarify the conditions under which they may be provided. NCI suggests that "captions" be defined as "a visual depiction of information simultaneously being provided on the audio portion of a television signal."[12] "Text" would be defined as "caption-related text" and "extended data service information" means "information that is neither a caption nor text." Comment is requested on whether these definitions are necessary or appropriate as a means of emphasizing which information services are secondary to captions on line 21.

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[8] EIA/CEG cites the *Order* (note 25) which states "When closed captioning was first authorized, the first half of line 21, field 2 was used to transmit a barker code so that decoders could easily determine when closed-captioned information was transmitted. In practice, it was found that the barker code was unnecessary." EIA/CEG explains that no decoders were built that used the (barker) reference pulse and argues that reserving even limited spectrum for these obsolete purposes represents a waste of a valuable resource. (EIA/CEG Petition at note 10.

[9] EIA/CEG petition, p. 5.

[10] Overscanning is the deflection of the scanning beam beyond the mask on a television picture tube. The mask is usually part of the television cabinet and it covers a small part (the edges) of the picture.

[11] Such "special signals" were described in an April 12, 1970 Public Notice and may not be transmitted without specific authorization by the Commission. See 22 FCC 2d 779 (1970).

[12] The proposed definitions are those currently used by NCI. In an aside remark, NCI notes that "captioning" is "the process of creating captions."

13. With respect to ATSC's petition, we believe that while many advances in NTSC television quality have been made over the years, picture degradation through ghosting[13] may be the most significant reception defect yet to be eliminated or minimized. Ghosting is a widespread problem in most over-the-air TV reception and may even occur in a milder form in cable reception. Therefore, an effective system of reducing or eliminating ghosts would be a significant technical improvement which would be of direct benefit to viewers. It was for this reason, in large part, that the pertinent rule was suspended[14] on October 22, 1992, to permit over-the-air testing of ghost-reduction systems.

14. There are several issues requiring exploration in this matter. First, is there any significant use of the VIR signal today? As ATSC notes in its petition:

> "For the VIR signal to be maximally effective for the consumer, the VIR signal must be added at the time the program is created and must remain unchanged during distribution of that program in a television distribution system. It was difficult for television stations to consistently apply the signal given the complexities of program production and distribution. And a mis-applied VIR signal could actually change the consumer's received color rendition for the worse."[15]

This statement indicates that VIR implementation has been far from complete. Nevertheless, we solicit additional comment on any current uses of the VIR and whether they should preclude its abandonment in favor of a GCR signal.

15. Second, ATSC asks that we embody the definition of the Philip's Laboratory GCR signal in an OET Bulletin with a reference to it being placed in the rules, inasmuch as ATSC membership agreed on the selection of Philip's GCR system as being the best of those tested. By this action the Commission would clearly ratify the industry's selection. We have taken similar action in the past, most notably when we adopted standards for TV stereo.[16] We solicit comment on this proposal and the specific rule changes contained in the attached Appendix A. We also ask whether or not flexibility and future improvements in ghost-cancelling technology would be hindered by this approach. Alternatively, we could simply reserve all of line 19 for use by ghost-cancelling reference signals without specifying any particular system. Lastly, we solicit comment on any other relevant circumstances or potential problems that may be associated with the implementation of the GCR reference signal on line 19.

Conclusion

16. As stated above, significant benefits can be derived by prompt action in this rule making. TV manufacturers are currently designing receivers equipped with closed-captioning circuitry mandated by the Television Decoder Circuitry Act of 1990 (Pub. L. 101-431) as implemented in Section 15.119 of our Rules. The earlier we can act on the proposals discussed herein, the less disruptive it will be for manufacturers already planning their compliance with this requirement and the sooner televisions equipped with these features can be made available to the public. Therefore, to bring these improvements to the public with a minimum of delay, we establish below relatively short deadlines for filing comments and reply comments. Extensions of the comment and reply comment deadlines will require substantial justification, as we desire to proceed to the *Report and Order* phase of this proceeding as soon as possible.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

17. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§1.1202, 1.1203 and 1.1206(a).

Comment Information

18. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **March 1, 1993** and reply comments on or before **March 16, 1993.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Regulatory Flexibility Act

19. An Initial Regulatory Flexibility Analysis is contained in Appendix B of this Notice of Proposed Rule Making.

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[13] Ghosting is caused by reflections in the path of the TV signal. In most cases of ghosting, the strong primary signal travels in the most direct path between the TV transmitter and the receiver. However, because the signal is radiated in all directions, signals emitted in other directions can reflect off hills, buildings and other objects (including passing airplanes) and arrive at the receiving antenna slightly behind the main signal (the delay is due to the additional distance the signals must travel). This results in a trailing ghost (i.e., a fainter image or "ghost" to the right of the desired image). Multiple ghosts are caused by the reception of multiple reflected signals. A leading ghost (i.e., a fainter image or "ghost" to the left of the desired image) may be caused by pickup of a signal in the receiver's tuner circuits which arrives before the main signal delivered by the antenna.

[14] See *Order*, "Suspension of Section 73.682(a)(21)(iv) of the Commission's Rules to Permit Additional Use of Line 19 of the TV Vertical Blanking Interval," 7 FCC Rcd 7158 (1992).

[15] ATSC Petition, p. 5.

[16] The Commission took similar action with respect to its selection of a specific TV stereo system. Reference is made to the "BTSC system of stereophonic sound transmission" in Section 73.682(c)(3) of the Rules, the specifications of which are described in detail in OST Bulletin No. 60.

Additional Information

20. For additional information on this proceeding, contact James E. McNally, Jr., Mass Media Bureau, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

We propose to amend Title 47 of the Code of Federal Regulations as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303

2. Section 73.682 would be amended by revising paragraphs (a)(21)(iv) and (a)(22)(i), (a)(22)(i)(A), (a)(22)(i)(B) and by removing paragraphs (a)(22)(i)(C) and (a)(22)(i)(D) as follows:

§73.682 TV transmission standards.

(a) * * *

(21) * * *

(iv) Regardless of other provisions of this paragraph, Line 19, in each field, may be used only for the transmission of the ghost-cancelling reference signal described in OET Bulletin No._____.

(22)(i) Line 21, in each field, may be used for the transmission of a program-related data signal which, when decoded, provides a visual depiction of information simultaneously being presented on the aural channel (captions). Such data signal shall conform to the format described in Figure 16 of §73.699 and may be transmitted during all periods of regular operation. On a space available basis, line 21 field 2 may also be used for additional text and extended data service information.

Note: The signals on Fields 1 and 2 shall be distinct data streams, for example, to supply captions in different languages or at different reading levels.

(A) A decoder test signal consisting of data representing a repeated series of alphanumeric characters may be transmitted at times when no program-related data is being transmitted.

(B) The data signal shall be coded using a non-return-to-zero (NRZ) format and shall employ standard ASCII 7 bit plus parity character codes.

Note: For more information on data formats and specific data packets, see EIA-608, "Line 21 Data Services for NTSC," available from the Electronics Industries Association.

* * * * *

3. Section 73.699 would be amended by removing Figures 16, 17B, 17C and by redesignating Figure 17A as Figure 16.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by §603 of the Regulatory Flexibility Act, the Commission has prepared the following Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981)).

Reason for Action

The purpose of this *Notice* is to consider changes in the use of the vertical blanking interval of broadcast television signals.

Objectives

This action is intended to improve the general quality of television service by providing for enhanced closed-captioning service and, secondary to that, other broadcast-related information services capable of depiction in an alphanumeric format. Additionally, the rules proposed would permit the transmission of a special ghost-cancelling reference signal that when used with TV receivers having the proper decoding circuitry, could eliminate much, if not all, picture degradation due to the reception of reflected, low amplitude TV signals.

Legal Basis

Authority for the actions proposed in this *Notice* may be found in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303.

Reporting, Recordkeeping, and Other Compliance Requirements

None.

Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule

None.

Description, Potential Impact and Number of Small Entities Involved

The services permitted by the new rules are entirely optional in character. However, their appeal to the public is likely to be such that most TV broadcast licensees will want to obtain the equipment with which to provide them. Thus, as a practical matter, the new rules would have an impact on some 1,500 licensees.

Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives

There are none.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-306

In the Matter of

Request by Press Broadcasting Company, Inc., to Amend Section 76.51 of the Commission's Rules to Include Clermont, Florida, in the Orlando-Daytona Beach-Melbourne-Cocoa, Florida, Television Market — RM-7994

NOTICE OF PROPOSED RULE MAKING

Adopted: December 21, 1992; Released: December 31, 1992

Comment Date: February 22, 1993
Reply Comment Date: March 9, 1993

By the Commission:

1. Before the Commission is a Petition for Rulemaking filed by Press Broadcasting Company, Inc. ("Press"), licensee of WKCF(TV), Channel 68 (Independent), Clermont, Florida, seeking to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the Orlando-Daytona Beach-Melbourne-Cocoa, Florida, television market[1] to include the community of Clermont, Florida. Public Notice of the filing of the Press petition was issued on May 22, 1992. No responsive pleadings were received.

BACKGROUND

2. By previous action, the Commission granted a Press request for waiver of Section 73.658(m) of the Commission's Rules to allow WKCF to be included in the subject market for purposes of the territorial exclusivity.[2] As a result, WKCF is able to compete with stations in the Orlando-Daytona Beach-Melbourne-Cocoa market for exclusive rights to nonnetwork television programming. In addition, since the filing of the instant petition, the Commission granted a Press Petition for Extraordinary Relief and ruled that WKCF was a "local signal" in the market for mandatory cable carriage (and thus copyright) purposes for the period between December 11, 1989 and November 13, 1991.[3] Press now requests that the Commission formally redesignate the market as requested in order that WKCF may now and in the future be considered a local station in the market area under the compulsory copyright license.

3. Specifically, Press states that despite the Commission's determinations regarding WKCF's competitive position in the subject market, some confusion and uncertainty remains as to whether the station is a local signal (and therefore not subject to distant signal copyright fees) for market-area cable systems under the compulsory copyright license, 17 U.S.C. § 111.[4] Press notes that under the compulsory copyright license, a station is considered a "local signal" for purposes of determining a cable operator's copyright compensation liability based, in part, on the market designations contained in Section 76.51 of the Commission's Rules. Press acknowledges that the Commission is considering whether (and if so, how) to update the Section 76.51 listing of market designations,[5] but contends that the Commission stated that it will not decline to act in the interim where an unambiguous fact pattern indicates that the rule appears to be functioning in conflict with its intended purpose.[6] Press thus argues that the relief it requests is justified in light of the Commission's previous recognition of WKCF's competitive position in the subject market.

4. As to formal redesignation of the market, Press maintains that its previous request for relief from the territorial exclusivity rule demonstrates that it meets the criteria for redesignation of the market to include Clermont. Press incorporates and reiterates the showings contained in its previous submissions, including evidence that Clermont's proximity to Orlando (20 miles) forces it to compete for programming based on Orlando market rates. Further, Press contends that because WKCF already provides an over-the-air Grade B signal to virtually all of the existing market, redesignation of the market would not significantly expand the station's coverage area by obtaining local carriage status. Finally, Press asserts that in order to eliminate any possibility of further confusion or uncertainty as to its competitive position vis-a-vis other stations in the market -- which will assertedly assure its competitive viability in a manner consistent with the Commission's past actions with respect to WKCF -- the proposed redesignation is warranted.

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[1] The Commission added the communities of Melbourne and Cocoa to the former Orlando-Daytona Beach Television market in 1985. *Major Television Markets (Orlando-Daytona Beach-Melbourne-Cocoa, Fla.)*, 102 FCC 2d 1062 (1985).

[2] *See Press Television Corp.*, 4 FCC Rcd 8799 (1989), *aff'd on recon.*, 6 FCC Rcd 6563 (1991) (*Press I*).

[3] *Press Television Corporation*, FCC 92-460 (released November 9, 1992).

[4] Press reports that the United States Copyright Office has advised one area cable operator that its carriage of WKCF would subject it to additional "distant signal" copyright liability based on the existing market designations of Section 76.51 despite the Commission's determination that the station is an actual competitor in the market.

[5] *Further Notice of Proposed Rulemaking* in Gen. Docket No. 87-24, 3 FCC Rcd 6171 (1988). That rulemaking generally concerns a review of the scope of the territorial and cable television exclusivity rules and the market designations used for purposes of those rules, and related issues involving market designations and the compulsory copyright license. *See* 3 FCC Rcd at 6176, n.15. We note that the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385 (Cable Act of 1992), requires the Commission to make necessary revisions to Section 76.51 of the Commission's Rules, the list of television markets, in connection with a rulemaking proceeding on must-carry. That proceeding is going forward on a separate track.

[6] *Press I*, 4 FCC Rcd at 8801.

DISCUSSION

5. The top 100 television markets, including hyphenated markets, are those specified in Section 76.51 of the Commission's Rules.[7] This market list is not only used to determine territorial exclusivity rights under Section 73.658(m), but also helps define the scope of compulsory copyright license liability for cable operators. *See* 17 U.S.C. §111(f). The "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Redesignation of the market as requested in this case will permit market-area cable systems to carry WKCF on an equal basis with other television stations licensed to communities within the market without incurring "distant signal" copyright liability. It would also extend the area in which Orlando-Daytona Beach-Melbourne-Cocoa stations are considered local signals under the market definition provisions of the Commission's Rules, and thus redefine the area in which such stations may assert syndicated exclusivity and network nonduplication rights.

6. The Commission has defined a hyphenated television market as one characterized by more than one major population center supporting all stations in the market but with competing stations licensed to different cities within the market area. *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972). Market hyphenation "helps equalize competition" where, due to population, geographic or other factors, some stations licensed to different communities beyond the Grade B contours of those stations in a given television market compete for economic support. *Id.* In evaluating past requests for hyphenation of a market, the Commission has considered some or all of the following factors as relevant to its examination: (1) the distance between the proposed community and the existing designated communities; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. *See, e.g., Major Television Markets (Fresno-Visalia, Calif.)*, 57 RR 2d 1122 (1985). Each of these factors assists the Commission to evaluate individual market conditions consistent with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete.

7. Based on the facts presented, we believe that a sufficient case for market hyphenation has been set forth so that this proposal should be tested through the rulemaking process and comment requested from interested parties. Accordingly, we seek comment on adding Clermont to the hyphenated Orlando-Daytona Beach-Melbourne-Cocoa, Florida, market as requested by Press. It appears from the information before us that WKCF and the stations in the presently designated market have coverage areas that substantially overlap and that such stations do, in fact, compete for audiences throughout the market area. Although the communities involved are not directly adjacent, the location of WKCF's transmitting antenna on the same broadcast tower used by a Daytona Beach station supports treating the two stations as part of the same market. Arbitron's conclusion that Clermont is within the Orlando-Daytona Beach-Melbourne "area of dominant influence" also supports this conclusion. The fact that WKCF and other market-area stations are economically interdependent and competitive further underscores our tentative conclusion that WKCF is "local" in the market proposed to be redesignated.

8. Accordingly, based on our stated policy considerations, we tentatively conclude that Section 76.51 of the Commission's Rules should be amended by adding Clermont to the Orlando-Daytona Beach-Melbourne-Cocoa, Florida, market designation, and we seek comment on this tentative conclusion.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

9. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Comment Information

10. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **February 22, 1993,** and reply comments on or before **March 9, 1993.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

11. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. A few number of television licensees and permittees will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small

[7] The Orlando-Daytona Beach-Melbourne-Cocoa television market is currently ranked 55th in Section 76.51. For markets not listed in Section 76.51, the Commission refers to the most recent ARB *Television Market Analysis*.

Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

12. For additional information on this proceeding, contact Alan E. Aronowitz, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-2
Phase I

In the Matter of

Filing and Review of Open
Network Architecture Plans

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: December 1, 1992; Released: January 4, 1993

By the Commission:

I. INTRODUCTION

1. In this Order, we grant in part and deny in part petitions filed by five Bell Operating Companies (BOCs) for reconsideration and clarification of the *BOC ONA Amendment Order*.[1] The primary focus of the petitions is the Commission's decision to require the BOCs' enhanced services operations to take the same access to Operations Support Systems (OSS) that the BOCs provide independent enhanced service providers (ESPs). In addition, BellSouth seeks reconsideration of the requirement that BOCs provide mid-year geographic deployment projections of ONA services. We affirm our OSS same access requirement, and clarify that this OSS requirement applies to basic service arrangements (BSAs) and basic service elements (BSEs) that BOC enhanced services and independent ESPs order to provide enhanced services.[2] We also direct the BOCs to work with ESPs through the Information Industry Liaison Committee (IILC) to develop methods to provide ESPs indirect access to ONA OSS services for complementary network services (CNSs) for their customers.[3] In addition, we require each BOC to report by July 15, 1993 on its progress in the IILC, and in its own operations, in developing this ESP OSS access capability. Finally, we modify the requirement for geographic deployment projections to require end-of-year instead of mid-year projections, and to require a report of actual prior year deployment, beginning April 15, 1993.

II. BACKGROUND

2. The *BOC ONA Reconsideration Order* directed that several OSS capabilities be treated as basic ONA services: service order entry and status; trouble reporting and status; diagnostics, monitoring, testing and network reconfiguration; and traffic data collection.[4] The *BOC ONA Amendment Order* stressed the importance of comparably efficient access by ESPs to these OSS functions being offered by the BOCs. We found, however, that direct access by ESPs to OSS capabilities might compromise network security and control, as well as customer privacy. We concluded that we did not have sufficient information to determine whether the indirect gateway access to OSS that the BOCs propose to offer the ESPs is comparably efficient to direct access. Therefore, the *BOC ONA Amendment Order* required that the BOCs' enhanced services operations take the same access to OSS services as the BOCs provide to other ESPs once structural separation requirements are lifted.[5]

III. DISCUSSION

A. BOC Same Access to OSS

3. SWBT and Pactel seek reconsideration of the requirement that BOCs take the same access to OSS as other ESPs.[6] SWBT states that the reasons for requiring indirect access by ESPs -- customer privacy and security of the BOC network -- do not apply to access by BOC personnel. SWBT contends that there are other safeguards that prevent BOC discrimination, such as the customer proprietary network information (CPNI) rules, installation and maintenance reporting, annual nondiscrimination affidavits, and nondiscrimination training. Pactel also seeks clarification that comparably efficient access to OSS will be evaluated on the basis of comparable performance and functionality. Pactel argues that a BOC should be able to meet this requirement either by providing indirect access to both the BOC enhanced services operations and independent ESPs, or by showing that indirect and direct access are comparably efficient. Pactel argues that BOCs should be allowed to make this showing on a service-by-service basis as the four OSS capabilities identified by the Commission are

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[1] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2 Phase I, 4 FCC Rcd 1 (1988) (*BOC ONA Order*), *reconsideration*, 5 FCC Rcd 3084 (1990) (*BOC ONA Reconsideration Order*), *further order*, 5 FCC Rcd 3103 (1990) (*BOC ONA Amendment Order*), *pets. for rev. pending*, California v. FCC, No. 90-70336 (9th Cir. filed July 5, 1990), 6 FCC Rcd 7646 (1991)(*BOC ONA Further Amendment Order*), *pet. for review pending*, MCI Telecommunications Corp. v. FCC, No. 92-70189 (9th Cir. filed Feb. 19, 1992). Appendix A contains a list of petitioners and the parties filing comments in this proceeding.

[2] BSAs are fundamental tariffed switching and transport services. BSEs are optional unbundled features, such as calling number identification, that ESPs may require or find useful in configuring an enhanced service. *BOC ONA Order*, 4 FCC Rcd at 36, paras. 56-57.,

[3] CNSs are optional unbundled basic service features, such as call forwarding, that an end user may obtain from a carrier in order to receive or utilize an enhanced service. *Id.*

[4] 5 FCC Rcd at 3087, para. 26. The *BOC ONA Reconsideration Order* stated that specific ESP requests for these OSS services must be evaluated according to the criteria established in the *Phase I Order:* expected market demand; their utility as perceived by ESPs; and the technical and cost feasibility of unbundling and providing these services. 104 FCC 2d at 1065, para. 217.

[5] 5 FCC Rcd at 3108, para. 43.

[6] SWBT Petition at 18; Pactel Petition at ii.

developed.[7] Pactel contends that precise equality eliminates the opportunity to achieve some of the benefits of integrated enhanced and basic services.[8]

4. We reaffirm our decision in the *BOC ONA Amendment Order* and require that until the BOCs can demonstrate that indirect access and direct access to the OSS services specified in that order are comparably efficient, the BOCs enhanced services must take the same types of access to those specified OSS services for BSAs and BSEs used for BOC enhanced services as the BOCs provide to other ESPs once structural separation requirements are lifted.[9] All of the non-BOC parties oppose removing the same access to OSS requirement, arguing that removal would provide the BOCs with a competitive advantage.[10] The *Computer III* Orders[11] defined equal access as comparably efficient interconnection (CEI) and developed standards for determining whether ONA services are comparably efficient.[12] In the *BOC ONA Amendment Order*, we stated that we did not have enough information on the record to decide if interconnection through a gateway provides comparably efficient interconnection. The BOCs have not argued in this proceeding that gateway access is comparably efficient to direct access. Instead, some of the BOCs have argued that it is too early in the development of OSS gateway capability for them to establish comparability. BOCs may demonstrate comparability on a service-specific basis, consistent with CEI standards, at a later date.

5. We disagree with SWBT's contention that direct access by BOC enhanced services personnel to BOC OSS should be permitted because nondiscrimination safeguards prevent BOC discrimination against ESPs. These safeguards do not address the fundamental requirement that the BOCs offer CEI to the network for ONA services, including OSS services. We agree with those parties that argue that nonstructural safeguards, such as the CPNI rules and the installation and maintenance reporting requirements, do not address whether indirect access is comparably efficient as defined in the *Computer III* proceeding.[13]

6. In addition, we clarify the OSS same access requirement for OSS services related to BSAs and BSEs. Orders for OSS services with respect to BSEs and BSAs used for BOC enhanced services must be received and processed by the BOC in the same ways as orders for OSS services for BSEs and BSAs coming from ESPs. If ESPs can use a gateway or call in an order to the business office or repair service, BOC enhanced services may have only the same options. BOC integrated and network personnel, such as business office or repair office personnel, may then directly access OSS to process orders for both the BOC and independent ESP enhanced services.[14]

B. OSS Access to CNSs

7. All of the petitioners request that the Commission clarify that the OSS same access requirement does not apply to CNSs.[15] All the non-BOC parties argue that narrowing the focus of the same access requirement would weaken that requirement.[16] We clarify that the OSS same access requirement in the *BOC ONA Amendment Order* applies only to the BSAs and BSEs used for BOC enhanced services. We agree with the BOCs that our decision to consider OSS capabilities specified in the *BOC ONA Reconsideration Order* as ONA services was predicated on the assumption that these OSS capabilities would assist the ESPs in managing their own networks, enhancing each

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[7] Pactel Petition at 3-4. *See also* BellSouth Petition at 7 n.11.

[8] Pactel argues that since privacy and security concerns prevent the BOCs from offering direct access to independent ESPs, the *BOC ONA Amendment Order* effectively requires the BOC enhanced services operations to use indirect access. Pactel Petition at 2 n.3.

[9] US West requests that we clarify which OSS services are included in the same access requirement of the *BOC ONA Amendment Order*. The OSS same access requirement applies to the four OSS capabilities identified in the *BOC ONA Reconsideration Order* as ONA services. US West Petition at 4. *See BOC ONA Amendment Order*, 5 FCC Rcd at 3108, para. 43; *BOC ONA Reconsideration Order*, 5 FCC Rcd at 3087, para. 26 & n.56. Those BOCs that already have been granted structural relief were granted a waiver of the same access to OSS requirement pending a Commission decision on the petitions for reconsideration and clarification. We extend those waivers until this decision is effective.

[10] AICC Opposition at 2, 4; AT&T Opposition at 5; ANPA Opposition at 5, 7; MCI Opposition at 1,11; US Sprint Comments at 4-6; BY Tymnet Opposition at 7; EDS Opposition at 4.

[11] Amendment of Sections 64.702 of the Commission's Rules and Regulations (*Third Computer Inquiry*), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration Order*), *second further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *Phase I Order* and *Phase I Reconsideration Order vacated sub. nom.* California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration Order*), *Phase II Order vacated sub nom.* California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review pending*, California v. FCC, No. 90-70336 (9th Cir. filed July 5, 1990; Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *pets. for recon. pending, pets. for rev. pending*, California v. FCC, No. 92-70083 (9th Cir. filed Feb. 14, 1992).

[12] In the *Computer III Phase I Reconsideration Order*, the Commission found that interconnection need only be comparably efficient, not necessarily identical, and that the BOCs are not required to perform impossible or grossly inefficient over-engineering of the network so that absolute equality is always achieved. In evaluating whether interconnection is comparably efficient, we used such factors as: absence of systematic differences between basic service access given to the carrier and to others, end-user perception of equality, and absence of a difference in the ability of competitors to provide their enhanced services. 2 FCC Rcd 3035, 3048 (1987) at para. 92.

[13] *Id. See also* US Sprint Comments at 4-5; MCI Opposition at 12-13.

[14] Nonstructural safeguards such as installation and maintenance reporting and CPNI rules ensure that BOC personnel do not discriminate against ESPs in processing orders.

[15] *See* US West Petition at 4; Pactel Petition at 6-13; BellSouth Petition at 1-2; SWBT Petition at 11; NYNEX Petition at 5. *See also* Bell Atlantic Comments at 2.

[16] *See e.g.* AICC Opposition at 6; AT&T Opposition at 5-7; MCI Opposition at ii, 15-16; ANPA Opposition at 6; EDS Op-

ESP's ability to manage its own lines and information.[17] We have not previously addressed the use of OSS to access information regarding the lines of third parties.

8. As discussed below, an OSS access requirement for CNSs presents several more complex and far-reaching problems than the same requirement for BSAs and BSEs. While BSAs and BSEs are used by ESPs to obtain their own basic communications requirements for the enhanced services they provide, CNSs are associated with an end user's line and may be used with either basic or enhanced services. We consider first whether independent ESPs are entitled to OSS access to their customers' CNSs, and second whether we should require that BOC enhanced services take the same access to CNSs as ESPs.

1. ESP Access to OSS for CNSs

9. Parties argue that ESPs should have access to OSS capabilities for CNSs on their customers' lines because it would enhance ESP marketing capabilities and enable them to provide their customers end-to-end service.[18] The *BOC ONA Order* directed the BOCs to address through the IILC means of providing OSS access that are both consistent with BOC technical, security, and network control needs, and responsive to ESP needs. BOCs have been developing plans for providing OSS services to ESPs for their own lines.[19] Although several BOCs oppose ESP access to OSS for CNSs for their customers' accounts because of the complexity of developing such gateways and the need to ensure control and customer privacy,[20] SWBT and US West express a willingness to provide such access through a secure gateway.[21]

10. We agree with those parties that argue that there are public interest benefits to enabling ESPs to order CNSs for their customers using the BOCs' ONA OSS services. The BOCs currently have sales agency procedures enabling third parties, with customer authorization, to request BOC services for their customers.[22] In the *BOC ONA Amendment Order*, we noted that the BOCs allow ESPs, with customer authorization, to order CNSs for their customers.[23] We view gateway access to certain BOC OSS for CNSs, with customer authorization, as an extension of this type of ordering capability.[24]

11. ESP access to BOC OSS for their customers' CNSs, however, raise unique privacy and security concerns. At the same time, the record demonstrates the potential for BOC development of secure OSS gateways. Such gateways would enable ESPs to access BOC OSS for CNSs for their customers without compromising the security and privacy of the BOC OSS and of non-ESP customers. ESP gateway access for CNSs over a secure gateway is more complex than that required for gateway access to BSAs and BSEs, but it provides the benefits of speed and efficiency for both the BOC and the ESP and enables the ESPs to be more competitive in their provision of ONA services.

12. Thus, we conclude that, for those ONA OSS services that BOCs provide through a gateway or by another means of mediated access, the BOCs should work with ESPs to determine ESP needs and demand for access to their customers' accounts and to enable ESPs to satisfy these needs by means of a secure access. We direct each BOC to work within the IILC to develop methods to provide ESPs indirect access to BOC ONA OSS services for CNSs for their customers, and to file an amendment to its ONA plan by July 15, 1993 to report on the means by which such access can be provided.[25] Each BOC should also report in that amendment on its own progress in providing this OSS access capability and on the methods it has established to address the security and CPNI concerns raised in this proceeding.

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position at 7 n.20.

[17] US West Reply at iii, 7, Appendix A; Bell Atlantic Reply at 2; BellSouth Petition at 8-10.

[18] AICC Opposition at 6; AT&T Opposition at 5-7; ANPA Opposition at 6; MCI Opposition at 11, 15; US Sprint Comments at 7. MCI argues that if there is a problem with an enhanced service, the ESP must be able to check that problem on an end-to-end basis, which requires access to OSS functions relating to the end user's line. BT Tymnet also argues that we should impose prior authorization requirements for CPNI. BT Tymnet at 12. In the *BOC Safeguards Order* we addressed the issue of BOC ESP access to CPNI. *See supra* note 11. Accordingly, we will not address BT Tymnet's arguments in this order.

[19] *BOC ONA Amendment Order*, 5 FCC Rcd at 3108 para. 39. *See also ex parte* materials from Bell South (dated February 21, 1991); Pactel (dated March 1, 1991); SWBT (dated February 19, 1991); *BOC ONA Further Amendment Order*, 6 FCC Rcd 7646 (1991).

[20] NYNEX contends that CNSs are local services. NYNEX Reply at 10. BellSouth argues that access to OSS does not provide ESPs with the right to control their customers' accounts for basic services, as MCI argues. BellSouth also argues that ESP access to CNSs would create difficulties in determining what services have been performed on a customer's line. BellSouth Reply at 7-8. BellSouth and Bell Atlantic state that current OSS are not designed for third party access and would be expensive to modify. BellSouth Reply at 8, Bell Atlantic Reply at 3. BellSouth and Bell Atlantic argue that ESPs could access other customers' CPNI. BellSouth Reply at 8, Bell Atlantic Reply at 3. Finally, Bell Atlantic contends that it might have to deny direct access to all BOC personnel, thereby eliminating joint marketing. Bell Atlantic Reply Comments at 3. MCI, on the other hand, argues that BOCs have exaggerated the costs of expanding their gateways to include CNSs. MCI Opposition at 21-22.

[21] SWBT Reply at 2 n.2; US West Reply at 18-20. US West states that such capabilities are being developed in recognition of a growing number of agency type relationships. However, US West states that it does not have a clear understanding of what features and functions ESPs desire. US West Reply at 3 n.10, 20.

[22] *See* NYNEX Reply at 9 n.12.

[23] 5 FCC Rcd at 3106, para. 23.

[24] We require the BOCs to ensure that their procedures include customer CPNI authorization procedures if third party access for CNSs includes access to a customer's CPNI. We also clarify that our OSS same access requirement does not alter our CPNI rules, and therefore does not grant to ESPs any additional substantive rights to access customer CPNI that happens to be in BOC OSS databases.

[25] This requirement applies only to the four OSS capabilities identified in the *BOC ONA Reconsideration Order* as ONA services that the BOCs provide through a gateway or other means of mediated access, pursuant to the criteria established in the *Phase I Order*, 104 FCC 2d at 1065, para. 217.

2. BOC Access to OSS for CNSs

13. Based on the current record, we conclude that at this time the benefits of requiring BOC enhanced services personnel to use the same access to OSS for CNSs as independent ESPs do are outweighed by the costs and would not be in the public interest.[26]

14. OSS capabilities pervade BOC operations. BOCs argue that the need to identify whether a CNS is associated with a basic or enhanced service, and then use indirect access for CNSs associated with enhanced services would eliminate the benefits of integration, including joint marketing.[27] According to the BOCs, their personnel are not now required to determine whether a customer is ordering or requesting a repair of a CNS in conjunction with a basic or enhanced service.[28] Generally, customers do not know whether their CNS requests are associated with basic or enhanced services. BellSouth argues that requiring BOCs to use same access to OSS for CNSs would mean that BOC repair service personnel would have to determine whether a customer was complaining about call forwarding in residential service or associated with a voice messaging enhanced service before entering a trouble report in one of two trouble reporting systems.[29] US West and NYNEX argue that this separation of functions could lead to customer confusion and delays in service.[30] Non-BOC parties argue, on the other hand, that BOCs should not have direct access to OSS for CNSs if other ESPs do not have similar access, because BOC enhanced services operations would have marketing advantages and opportunities for discrimination.[31]

15. In the *BOC Safeguards Order* we concluded that there are benefits that derive from BOC integrated marketing and other operations.[32] A same access requirement for access to OSS for CNSs by BOC integrated or enhanced services personnel, especially for joint marketing, appears to seriously undermine the benefits of integrated operations much more than the same access requirement for BSAs and BSEs. Moreover, we have previously found that BOCs provide CNSs to all end users pursuant to tariff for purposes other than simply to facilitate provision of an enhanced service.[33] Therefore, we concluded that the potential for any discriminatory behavior by the BOC in offering such services is speculative, and we limited the ONA requirements for CNSs.[34] For these reasons, we do not at this time extend the same access to OSS requirement to CNSs for BOC integrated or enhanced services personnel because the costs exceed the benefits. However, we may revisit this requirement if the BOCs do not show progress in developing capabilities for ESPs to access OSS for their customers' CNSs through secure gateways.

D. Geographic Deployment Projections

16. In the *BOC ONA Order*, the Commission required the BOCs to provide projections of the percentages of access lines that would be capable of supporting each of their initial ONA services, on a system-wide basis and for each geographic market in which they were deploying ONA. The *BOC ONA Amendment Order* required the BOCs to file mid-year deployment projections for 1992, 1993, and 1994 by April 15, 1991.[35] In addition, the *BOC ONA Further Amendment Order* required ongoing annual mid-year, three-year projections.

17. BellSouth requests that the Commission reconsider the annual geographic deployment reporting requirement and have the BOCs report projected deployment as of the end of the year rather than mid-year. Bell South states that its systems for projecting deployment schedules were developed to provide end-of-year projections, and the mid-year projection requires hundreds of hours of additional work.

18. Non-BOC parties did not object to BellSouth's request, and all the BOCs either support or do not object to BellSouth's request.[36] Since this Commission and other interested parties will be able to compare and analyze the BOCs' end-of-year projections, we grant BellSouth's request. In order to monitor more effectively the BOCs' progress in implementing ONA, we also require that the BOCs provide, on an annual basis, an additional report that shows the actual deployment of ONA services at the end of the prior year. Accordingly, we now require that, beginning in 1993, each BOC file on April 15 of each year: 1) the actual deployment of its ONA services as of December 31 of the previous year; and 2) the projected deploy-

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[26] *See* Bell Atlantic Reply at 3; Pactel Petition at 9; NYNEX Petition at 4. BellSouth argues that such a requirement would increase costs by approximately $9.5 million. BellSouth Reply at 9-10. SWBT estimates increased costs of $10-77 million. SWBT Petition at 14, 16, Exhibits 1-3.

[27] Pactel Petition at 10-11; NYNEX Petition at 4. NYNEX argues that requiring the BOCs to use indirect access would require that it have separate access vehicles, procedures, and personnel for enhanced services and network services. NYNEX Petition at 3. US West argues that BOC personnel must be able to use direct access to enter an order for a CNS or to process orders for customers of BOC enhanced services operations, or the advantages of joint marketing will be eliminated. US West Petition at 4. SWBT contends that if same access applies to CNSs, there will be increased costs and diminished customer service because all BOC personnel will have to access OSS through two separate terminals, use window terminals, or perform all functions through an expanded gateway. SWBT Petition at 14-16.

[28] SWBT Petition at 13; US West Reply at 15 n.36; Pactel Petition at 10 n.15.

[29] BellSouth Petition at 11.

[30] NYNEX Petition at 4; US West Reply at iii.

[31] MCI Opposition at 16; AICC Opposition at 6-7; AT&T Opposition at 6-7. BT Tymnet opposes reconsideration of same access for the BOCs. It does not oppose direct access to OSS by BOC network staff who may occasionally have orders for CNSs, but argues that BOC enhanced services operations personnel must use indirect access. BT Tymnet Opposition at Summary.

[32] *BOC Safeguards Order*, 6 FCC Rcd at 7575-7576.

[33] CNSs are locally tariffed basic services offered to end users by the BOCs, whether or not such end users are customers of ESPs. In other words, such services give end users access to the network for a variety of applications, not just enhanced service applications. *BOC ONA Order*, 4 FCC Rcd at 47, para. 83.

[34] *BOC ONA Order*, 4 FCC Rcd at 48, para. 85. We also found that the BOCs' standardized ordering and processing systems for providing basic services to end users ensures that the BOCs will not be able to discriminate against end users who purchase CNSs for use with a competing ESP's enhanced service. In the *BOC Safeguards Order*, the Commission stated that the practice of "unhooking," the targeting of enhanced service sales pitches at customers who contact the BOC to order network services to use with a competitor's enhanced service, was abusive. The Commission stated that it would investigate any claims that any BOC was engaging in such a practice. *Id.* 6 FCC Rcd at 7613-14.

[35] *BOC ONA Order*, 4 FCC Rcd at 190, para. 363.

[36] Letter from Gary J. Dennis, BellSouth, to James D. Schlichting, Chief, Policy and Planning Division, Common Carrier Bureau, FCC, dated March 13, 1991.

ment of its ONA services as of one, two, and three years from December 31 of the previous year. Each BOC must specify deployment in terms of the percent of access lines served, both for the entire region, and for each BOC-designated market area. Accordingly, in the April 15, 1993 annual report, the BOCs must provide deployment schedules as of December 31, 1992, and projected deployment schedules as of December 31, 1993, December 31, 1994, and December 31, 1995.[37]

IV. CONCLUSION

19. In this Order, we clarify that the OSS same access requirement established in the *BOC ONA Amendment Order* applies to BSEs and BSAs that BOC enhanced services use for providing enhanced services, and includes only the four OSS specified in the *BOC ONA Reconsideration Order* as ONA services. We also clarify that BOC enhanced services operations accessing these OSSs services for BSAs and BSEs they use to provide enhanced services may have only the same options and procedures for accessing these BOC OSS as are available to other ESPs. In addition, we conclude that there are benefits to providing ESPs with indirect access to ONA OSS services for CNSs for their customers' accounts, with customer authorization. Accordingly, we require each BOC to work with ESPs through the IILC to develop methods to provide ESPs with indirect access to ONA OSS services for CNSs for their customer's accounts, and to report on its progress in providing this capability by July 15, 1993. We determine that the OSS same access requirement should not, however, extend to access by BOC enhanced services personnel to BOC OSS services for CNSs. Finally, we modify the requirement for geographic deployment projections to require end-of-year instead of mid-year projections, and to require an actual prior year deployment schedule, beginning April 15, 1993.

V. ORDERING CLAUSE

20. IT IS HEREBY ORDERED, that pursuant to 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 218, 303(r), and 405, the petitions for reconsideration and/or clarification filed in this proceeding are GRANTED to the extent described herein and are otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Petitions

BellSouth Petition for Partial Reconsideration and Clarification (BellSouth Petition)

NYNEX Telephone Companies Petition for Clarification (NYNEX Petition)

Pacific Companies Petition for Partial Reconsideration and Clarification (Pactel Petition)

Southwestern Bell Telephone Company Petition for Clarification and Limited Reconsideration (SWBT Petition)

US West, Inc. Petition for Clarification (US West Petition).

Comments and Opposition to Petitions

The Alarm Industry Communications Committee (AICC)

American Telephone and Telegraph Company (AT&T)

American Newspaper Publishers Association (ANPA)

EDS Corporation (EDS)

MCI Telecommunications Corporation (MCI)

BT Tymnet, Inc. (BT Tymnet)

Bell Atlantic Telephone Company (Bell Atlantic)

US Sprint Communications Company (US Sprint)

Reply Comments

BellSouth

NYNEX

Pactel

SWBT

US West

Bell Atlantic

[37] *See also BOC ONA Further Amendment Order*, 6 FCC Rcd at 7649 para. 4, note 8; 7653 para. 9; and Appendix B.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability or
New West Broadcasting
Systems, Inc.

Licensee of Radio Station
KGMN(FM), Kingman, AZ

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1992; Released: January 4, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a $20,000 Notice of Apparent Liability (NAL) issued August 21, 1992, to New West Broadcasting Systems, Inc. (New West), licensee of Station KGMN(FM), Kingman, AZ [6 FCC Rcd 5556 (1992)]; and (2) New West's response to the NAL dated September 25, 1992.

2. The forfeiture was assessed for the apparent continuing violation of 47 U.S.C. Section 310(d) and Section 73.3540 of the Commission's Rules. Essentially, the NAL found that apparently beginning in 1985, control of KGMN was transferred from its three shareholders - Lowell T. Patton, Grant Holyoak and Bruce Owens - to Joseph Hart and Ronda Hart. It determined that: 1) the Harts, who were prospective purchasers of the station, worked at, and put money into the station prior to Commission approval of the pending assignment application; 2) the Harts held themselves out to the public as officers and directors of New West at a time when they had no Commission authorization to do so; and, 3) Rhonda Hart had signed Arizona Annual Report[s] and Certificate[s] of Disclosure, filed with the Arizona Corporation Commission, as an officer and director of New West. As a consequence, it assessed a forfeiture of $20,000 for that portion of the violation that had taken place within the statute of limitations.[1]

3. In response to the NAL, the licensee denies that there was an unauthorized transfer. It states that Rhonda Hart has worked for KGMN for many years and continues to work as a bookkeeper. Moreover, she did not appear as an officer or director of New West on its 1987 and 1988 Arizona Annual Reports[2] and neither she nor Joseph Hart has been involved in the ultimate decision to hire or fire employees, a task which, since at least 1988, has been performed by Lowell Patton. Additionally, it argues that, if an unauthorized transfer did occur, steps to ensure compliance began in 1985 and were strengthened in 1988. Thus, it contends, the misconduct ceased by some time in 1988, placing the violation, if any, beyond the statute of limitations. Finally, it maintains that the station's financial condition warrants a reduction or cancellation of the forfeiture. It submits documentation in support of this contention.

4. In an accompanying statement by Lowell T. Patton, he reiterates the foregoing and adds that, while Rhonda Hart has been the station's bookkeeper for years, Joseph Hart has never been a full-time employee and, currently, only assists the station in public relations and advertising matters on a part-time basis. Moreover, the statement indicates that Mr. Hart has ceased holding himself out as the President and General Manager, and stopped contributing funds to the operation of the station "years ago." Additionally, Patton states that after the Commission's first inquiry concerning the station, Grant Holyoak, one of New West's shareholders and a Kingman resident, went to the station virtually daily to ensure it was being run properly and that in 1988, when Mr. Holyoak's health failed, Patton began to increase his trips to the station. This resulted, he contends, in his personally hiring, or reviewing and approving of the hiring of all station employees since the fall of 1988. Finally, he states that the Harts are no longer the prospective purchasers of the station, which is struggling to survive and will be put out of business by the forfeiture as originally assessed.

5. Our review of the licensee's submission leads us to conclude that, while there was a *de facto* unauthorized transfer of control, it ceased at some time in 1988 placing it beyond the statute of limitations for imposing forfeitures.[3] This conclusion is drawn not only from the licensee's most recent filing but, independently, from information submitted to the Commission in the course of an entirely different investigation involving a completely unrelated licensee. In the course of that investigation pleadings were filed indicating, *inter alia*, that, on August 1, 1992, Lowell Patton executed a real estate lease between New West and Hualapai Broadcasters on behalf of New West. Accordingly, the totality of the information before the Bureau now indicates that Lowell Patton, a 50% shareholder in New West, has reasserted control over the

[1] Because of the statute of limitations on forfeitures contained in §503 of the Communications Act, as in effect at the time the instant NAL was issued, the NAL could only reach misconduct occurring within the three years prior to its issuance (i.e., subsequent to August 21, 1989). Although the unauthorized transfer began in 1985, the NAL stated that it had apparently continued to the present and, therefore, a significant portion of the violation was committed within the statute of limitations.

[2] In an accompanying statement, Lowell T. Patton, President and 50% shareholder in New West explains that such reports have not been filed for the past three years.

[3] At the time that the violation occurred and, as noted above, at the time the NAL was issued, Section 503(b)(6) of the Communications Act of 1934, as amended, provided for a maximum three year statute of limitations for forfeitures. This was amended by the Telecommunications Authorization Act of 1992, Pub. L. 102-538, 160 Stat. 3533 (1992), to allow the Commission to impose forfeitures back to the commencement of the licensee's current license term. The shorter, three year, statute of limitations governs this case.

licensee and did so more than three years prior to the date of the Notice of Apparent Liability herein. Thus, we will rescind the Notice of Apparent Liability. However, because we find that an unauthorized transfer of control took place between 1985 and 1988, we will admonish the licensee for its participation in this violation.

6. Accordingly, IT IS ORDERED, That the forfeiture assessed in the Notice of Apparent Liability issued against New West Broadcasting Systems, Inc., on August 28, 1992, IS RESCINDED. IT IS FURTHER ORDERED, That New West Broadcasting Systems, Inc., IS ADMONISHED, for its participation in an unauthorized transfer of control as more fully set forth in the Notice of Apparent Liability.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Radio Moultrie, Inc.

Licensee of Radio Station
WMGA, Moultrie, GA

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1992; Released: January 4, 1993

By the Chief, Mass Media Bureau

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration: (1) a $10,000 Notice of Apparent Liability (NAL)[1] issued June 23, 1992, to Radio Moultrie, Inc. (RMI), licensee of Station WMGA(AM), Moultrie, Georgia; and (2) RMI's response to the NAL filed August 7, 1992.[2]

2. The NAL was issued for apparent violations of Section 310(d) of the Communications Act of 1934, as amended, and 47 C.F.R. Section 73.3540(a), which require prior Commission consent to transfers of control; and for violation of the requirement to file an annual ownership report, 47 C.F.R. Section 73.3615(a). The NAL stated that information provided in RMI's April 3, 1991, assignment of license application (File No. BTC-910403EB), demonstrated that two prior unauthorized transfers of control had occurred between February and July 1990. The NAL also found that RMI had not filed an ownership report for 1990. The NAL inadvertently stated that this violation continued from December 1, 1989, instead of December 1, 1990.

3. RMI's response requests mitigation on three grounds. First, RMI states that the NAL failed to note fully the events leading to the unauthorized transfers of control as presented in the April 3, 1991, assignment application. The account provided in the assignment application chronicled the events at the station that led to the failure to file the required applications. Second, RMI notes that 1990 ownership report was due on December 1, 1990, rather than December 1, 1989, as the NAL inadvertently noted. RMI also states that it submitted an ownership report for 1990 with its April 3, 1991, assignment application. Therefore, RMI argues, the violation continued for four months, rather than since December 1, 1989, as noted in the NAL. Third, RMI argues that payment of a $10,000 forfeiture would cause it financial hardship.

4. As to RMI's first argument, while the NAL did not recite the entire account of events presented in the licensee's April 3, 1991, assignment application, the Commission did consider it fully. Not only did the Commission consider RMI's account of the events surrounding the violation but, indeed, it relied on that account in substantially reducing the forfeiture amount which our forfeiture guidelines would have permitted. Under the standards established in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), $20,000 is the base forfeiture amount for an unauthorized substantial transfer of control, making the base forfeiture amount for two such transfers $40,000. Therefore, no further reduction is warranted.

5. RMI correctly states that its 1990 ownership report was due on December 1, 1990, rather than December 1, 1989. Commission records also confirm that the assignment application filed April 3, 1991, contained an ownership report that reflected the ownership of the licensee corporation as of March 1, 1991. However, we do not believe that a forfeiture reduction for this violation beyond the reduction calculated in the NAL is warranted. The base amount for failure to file an ownership report under our *Policy Statement, supra*, is $7,500 per day of a violation. The NAL did not increase the forfeiture amount for this violation to reflect its continuing nature. Consequently, the duration of the violation does not warrant a further reduction in this case. RMI's compliance with Section 73.3615(a) by filing an ownership report that was required by its April 3, 1991, assignment application[3] does not obviate this violation so as to warrant further forfeiture reduction.

6. The claim of financial hardship presented by RMI does not warrant reduction of its forfeiture. In support of its reduction request for financial hardship RMI submits financial data for its fiscal year ending June 20, 1991. However, according to the statement from the certified public accountant who prepared the data, RMI failed to submit a profit and loss statement prepared under generally accepted accounting principles, which is required to support its claim of financial hardship. (*See* paragraph I(B) of the Attachment to the NAL.)

7. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED that Radio Moultrie, Inc., licensee of Radio Station WMGA(AM), Moultrie, Georgia, FORFEIT to the United States of America the sum of Ten Thousand Dollars ($10,000) for the willful and continuing violation of Section 310(d) of the Communications Act of 1934, as amended, and 47 C.F.R. Section 73.3540(a), which occurred from February 1990 until September 6, 1991; and for violation of 47 C.F.R. Section 73.3615(a), which occurred from December 1, 1990, until April 3, 1991. Payment of the forfeiture may be made by mailing to the Commission, a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] *Radio Moultrie, Inc.*, 7 FCC Rcd 3975 (MMB 1992).

[2] Upon timely request from RMI's counsel, the due date for RMI's response was extended to August 7, 1992.

[3] *See* Section I, Part II, Question 2 of FCC Form 315. Since the ownership report filed with RMI's April 3, 1991, assignment application contains the same information that would have been in its 1990 ownership report, had that report been timely filed, we accept it as an ownership report for 1990. However, RMI is reminded that Section 73.3615(a) of the Commission's Rules requires the filing of an ownership report once a year, on the anniversary of the date on which its renewal application is required to be filed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEFONICA LARGA DISTANCIA DE PUERTO RICO AND LD ACQUISITION CORPORATION — I-T-C-92-116-AL

Application for Consent to the Assignment of Section 214 Authority and the Amendment of Submarine Cable Landing Licenses.

TELEFONICA LARGA DISTANCIA DE PUERTO RICO AND TELECOMUNICACIONES ULTRAMARINAS DE PUERTO RICO — CSG-92-067-AL, 1022-DSE-AL-92(10), C4-92-001-AL

Applications for Consent to the Assignment of Title III International and Domestic Fixed Earth Stations and International Fixed Public Point-to-Point Telegraph and Telephone Station.

TELECOMUNICACIONES ULTRAMARINAS DE PUERTO RICO — I-T-C-92-121

Application for Certificate of Public Convenience and Necessity Pursuant to Section 214 of the Communications Act, as Amended, to Provide International Telecommunications Facilities.

MEMORANDUM OPINION, ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 18, 1992; Released: December 18, 1992

By the Commission: Commissioners Quello, Barrett and Duggan issuing separate statements.

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Appendix A - List of TLD's §214 Authorizations to Foreign Countries

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I. INTRODUCTION

1. The above-captioned applications stem from the proposed sale of the assets of Telefonica Larga Distancia de Puerto Rico ("TLD") to LD Acquisition Corporation ("LD").[1] TLD and LD (the "Applicants") request consent to the assignment of TLD's international Section 214 authorizations and submarine cable landing license interests from TLD to LD pursuant to Section 214 of the Communications Act of 1934 ("Communications Act"), and Section 1 of the Submarine Cable Landing Act of 1921 ("Cable Landing License Act"). In addition, because LD will be a foreign-owned and controlled carrier, TLD seeks to assign its common carrier radio licenses to an affiliated U.S.-controlled company, Telecomunicaciones Ultramarinas de Puerto Rico ("TUPR"), and TUPR asks for authority under Section 214 to lease these facilities to other carriers, including LD. For the reasons set forth below, we grant the above-captioned applications, subject to certain terms and conditions.

II. BACKGROUND

2. TLD is a public corporation wholly-owned by the Puerto Rico Telephone Authority ("PRTA"), which in turn is a public authority of the Commonwealth of Puerto Rico.[2] TLD provides interstate and international long distance telecommunications services between Puerto Rico, the U.S. Virgin Islands, and overseas points, and is regulated as a nondominant carrier for both domestic and international services. TLD provides international services

[1] LD states that upon completion of this transaction it will change its name to Telefonica Larga Distancia de Puerto Rico, Inc. To avoid confusion in this order, we will continue to refer to LD by its current name.

[2] PRTA also owns 100% of the Puerto Rico Telephone Company ("PRTC"), the monopoly local exchange carrier in Puerto Rico.

on both a resale and direct facilities basis.[3] As part of the Puerto Rico government's efforts to privatize the telephone system in Puerto Rico, PRTA and TLD have entered into an agreement to sell the majority of TLD's assets to LD. LD states it will assume responsibility for providing all of the services which the present TLD now provides to its customers, except for radio-based carrier-to-carrier facilities services.

3. LD is a Puerto Rico corporation which, at the time of the closing of the sale, will have 79 percent of its common stock owned by Telefonica International Holding, B.V. ("TI Holding"), a Netherlands corporation. TI Holding is a wholly-owned subsidiary of T.I. Telefonica International de Espana, S.A. ("TI"), a corporation organized under the laws of the Kingdom of Spain. TI is a subsidiary of Telefonica de Espana, S.A. ("Telefonica"), Spain's government-controlled monopoly telephone company.[4] PRTA will own 19 percent of LD's stock, and the remaining 2 percent will be placed in an employee stock ownership plan.

4. To comply with Section 310(a) and (b) of the Communications Act, LD will acquire only those assets of TLD which do not require Title III licenses, including (1) TLD's current and any pending Section 214 authorizations to provide international services and to acquire and operate facilities therefor,[5] and (2) TLD's submarine cable landing license interests in the Transcaribbean Cable System ("TCS-1")[6] and the TAINO-CARIB Submarine Fiber Optic Cable System.[7] Because TLD's remaining assets require Title III radio licenses (*i.e.* international and domestic fixed earth stations and an international fixed public point-to-point telegraph and telephone station), and are therefore subject to the alien ownership restrictions of Section 310(a) and (b), these assets will be transferred to TUPR, a new Puerto Rico corporation owned 85.1% by PRTA and 14.9% by TI Holding. TUPR will be a carrier's carrier, offering use of earth stations and point-to-point microwave radio facilities to LD and other common carriers under tariff. TUPR will not offer end-to-end services, and will hold no operating agreements.

III. DISCUSSION

5. The Applicants assert that the proposed transfer is in the public interest because it will privatize the assets of TLD and benefit the citizens of Puerto Rico in many ways. MCI, Sprint, and AT&T filed comments on the international aspects of the transaction, in which they do not formally oppose the transaction so long as conditions are placed on the parties to prevent anticompetitive activities from occurring. As described below, the conditions they request range from nondiscrimination safeguards to reciprocity. In addition, the Commission has received informal letters regarding this transaction from several citizens of Puerto Rico, the minority party delegation in the Puerto Rico House of Representatives, the Information Industry Association ("IIA") and Pacific Telesis. The Commission also has received letters expressing concerns with the transaction from Congressmen Dingell and Lagomarsino. Finally, the State Department has sent a letter approving assignment of TLD's cable interests subject to certain conditions.

6. The issues raised by this proceeding include, broadly, the potential anticompetitive effects of the proposed transaction in the markets for U.S. international and domestic telecommunications services. The transaction also raises reciprocity and national security issues in regard to TLD's cable interests.

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[3] The international services TLD is authorized to provide are international message telephone services ("IMTS"), international television service, and International Business Service ("IBS"). TLD does not have authority to provide any other non-IMTS services, including any international private line services (other than IBS), nor are LD and TUPR being granted such authority in this order. We also observe that should LD desire to expand its operations outside of Puerto Rico and the U.S. Virgin Islands to the U.S. mainland, it would be required to seek our approval under Section 214 of the Communications Act.

[4] Telefonica provides domestic and international telephone services in Spain. The Government of the Kingdom of Spain exercises control over Telefonica through its holdings of shares of Telefonica and through the legal regulatory structure within which Telefonica operates. The Kingdom of Spain owns, directly or indirectly through other state-owned institutions, approximately 34.9 percent of the outstanding ordinary shares of Telefonica. As of December 31, 1991, the Kingdom of Spain was the only holder known by Telefonica to own more than 10 percent of any class of its voting securities.

Telefonica also has the following investments in other telecommunications entities: (1) Chile - 43.6% interest in Compania de Telefonos de Chile, a local carrier, and 20% interest in ENTEL, one of two long distance carriers; (2) Argentina - 8.04% interest in, and provides management services for, Telefonica de Argentina, a local and long distance carrier serving southern Argentina; and (3) Venezuela - 16% interest in the consortium which owns 40% of CANTV, Venezuela's local and long distance carrier.

[5] This assignment will include TLD's interests in the recently filed applications for Section 214 authorizations and licenses to land and operate the following high capacity digital submarine cable networks: (1) COLUMBUS II, which will operate between the United States, Mexico, U.S. Virgin Islands, Spain, Italy, and Portugal (File Nos. SCL-93-001, ITC-93-029); and (2) AMERICAS-1, which will operate between the United States, U.S. Virgin Islands, Brazil, Trinidad and Venezuela (File Nos. SCL-93-002, ITC-93-030).

[6] TLD has been authorized to acquire and operate 91 half Minimum Assignable Units of Ownership ("MAUOs") in Segment G of the TCS-1 cable system (30 for service to the Dominican Republic, 31 for service to Colombia, 18 for service to Jamaica, and 12 for service to Haiti), and is authorized to acquire and operate 990 whole MAUOs in Segment F for domestic private line service between Puerto Rico and the United States. Up to 150 of these 990 MAUOs also have been authorized for the provision of TLD's regularly authorized services between Puerto Rico and the overseas points TLD is authorized to serve. At present TLD is using 8 circuits to Canada, and 12 circuits to Mexico for the provision of international services on a direct facilities basis. The remainder of the 150 MAUOs interconnect with the switches of other common carriers for the provision of TLD's authorized international services on a resale basis. *See* Appendix A.

[7] In the TAINO-CARIB cable system, TLD has 26 jointly assigned Minimum Investment Units ("MIUs"), 106 solely assigned MIUs and 238 half MIUs in Segment E2 and E3 from TLD's Isla Verde, Puerto Rico cable station to St. Thomas, U.S. Virgin Islands. From St. Thomas, U.S. Virgin Islands to Tortola, British Virgin Islands (Segment E4), TLD has 7 jointly assigned MIUs, 10 solely assigned MIUs and 27 half MIUs. *See* Appendix A.

A. Market Entry by Foreign Carrier Affiliates

(1) Positions of the Parties

7. Sprint is concerned that LD's applications, if granted, would enable Telefonica to enter the U.S. market as a facilities-based carrier providing both domestic and international services, even though no equivalent rights exist for U.S. carriers to enter the communications market in Spain for the provision of basic services. According to Sprint, this asymmetry provides Telefonica with a strong incentive to treat U.S. carriers inequitably.[8] While Sprint states that, as a general matter, it does not oppose the provision of international services from the U.S. by foreign-owned carriers, it urges that any authorization granted to LD for the provision of international services be conditioned upon reciprocal rights being granted to U.S. carriers in Spain. Sprint argues, in other words, that before we grant LD's applications, U.S. carriers should be permitted by Spain to provide domestic and international services and to provide such services upon terms which are substantially equivalent to those granted foreign carriers in the United States. According to Sprint, the Cable Landing License Act requires as much. Sprint believes the Commission should use its Section 214 licensing authority as leverage to encourage increased liberalization in international telecommunications competition, while protecting U.S. carriers from any unfair advantage received by foreign carriers operating in the competitive U.S. environment.[9] LD responds that Sprint is addressing global issues that are wholly inappropriate in this proceeding.[10]

8. MCI, by contrast, requests only the imposition of appropriate nondiscrimination conditions to guard against potential anticompetitive activity, as described in more detail in Section III.C., *infra*. In its initial comments, AT&T similarly requested that we impose dominant carrier regulation on LD, as well as certain other nondiscrimination safeguards, which AT&T had asked the Commission to adopt as a general matter of policy in CC Docket No. 91-360, *Regulation of International Common Carrier Services (International Services)*.[11] More recently, AT&T urged the Commission to withhold action on individual applications filed by entities with foreign telecommunications affiliates "until a comprehensive policy framework is established."[12] It is AT&T's position that substantial market entry concerns are raised by LD's applications and that these concerns should not be addressed ad hoc in individual applications.[13] AT&T argues that should the Commission determine that the public interest in privatizing TLD warrants a grant in this particular case, certain conditions should be imposed until such time as the foreign markets controlled by Telefonica or its affiliates are open to U.S. based carriers.[14] LD responds that all interested parties have had the opportunity to comment on its applications, that the record is complete, and that its applications are ripe for Commission decision.[15]

(2) Discussion

9. We decline to apply a strict policy of reciprocal entry, as defined by Sprint, in considering the merits of LD's applications under Section 214 of the Communications Act.[16] This Commission has consistently sought to provide for open entry in the United States for carriers originating or terminating U.S. international voice or record carrier services as a means of encouraging competition in these services, and lower prices for U.S. consumers.[17] We do, however, consider the closed nature of foreign markets to be a serious problem because of the potential for discrimination among U.S. carriers terminating traffic in the foreign market. This potential discrimination could adversely affect the public interest by undermining the benefits of competition, and is one factor, among several, that is relevant to the Section 214 public interest determination.

10. We have noted with favor the significant telecommunications investments made by U.S. companies in other countries since 1985.[18] Nevertheless, we recognize that, for the most part, U.S. entities today are denied opportunities to operate as facilities-based international service providers in foreign telecommunications markets, including Spain.

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[8] Sprint Comments at 2-3 (citing *Atlantic Tele-Network, Inc.*, 6 FCC Rcd 6529 (Com. Car. Bur. 1991)(*ATN Order*), *app. for review pending*. Sprint expresses particular concern that the planned COLUMBUS II cable system between Spain and the U.S. Virgin Islands, *see supra* note 5, will be able to connect to the TAINO-CARIB cable system, giving Telefonica a ready means to bypass U.S. carriers entirely in the provision of Spanish-originating U.S. traffic. *Id.*

[9] Sprint Comments at 3-4. *See also* informal comments submitted by the IIA and Congressman Dingell expressing concerns with the transaction because Spain does not allow U.S. carriers to enter its markets.

[10] LD Reply at 6.

[11] *See Report and Order*, FCC 92-463, released November 6, 1992, at para. 37. *See also* AT&T Comments at 7-12.

[12] Letter to Donna R. Searcy, Secretary, FCC, from Elaine R. McHale, Senior Attorney, AT&T, dated November 3, 1992 ("McHale Letter"); *see also* Letter to Cheryl A. Tritt, Chief, Common Carrier Bureau, FCC, from Thomas H. Norris, AT&T, dated December 3, 1992 ("Norris Letter").

[13] AT&T states that these concerns include: potential leveraging of foreign market power to impact adversely the competitive U.S. marketplace; perpetuation of high, non-cost-based accounting rates; U.S. trade policy implications of permitting foreign access to U.S. telecommunications markets while markets abroad remain closed; and damage to U.S. carriers' ability to compete in a global market with carriers who have full access to customers in their home country.

[14] AT&T's proposed safeguards are discussed *infra* in Section III.C. *See* Norris Letter, *supra* note 12.

[15] Letter to Donna R. Searcy, FCC, from Paul J. Berman and James L. McHugh, Counsel for TLD and LD, respectively, dated November 17, 1992.

[16] We address the merits of Sprint's argument under the Cable Landing License Act in Section III.B., *infra*.

[17] *Regulatory Policies and International Telecommunications*, CC Docket No. 86-494, *Report and Order and Supplemental Notice of Inquiry*, 4 FCC Rcd 7387, 7428 (1988)(citing *Notice of Inquiry and Proposed Rulemaking*, 2 FCC Rcd 1022, 1025 (1987)). *See also FTC Communications, Inc.*, 2 FCC Rcd 6114 (1987) (granting switched service facilities-based authorization to U.S. carrier 14.9 percent of which is owned by company held indirectly by French government). *Cf. The French Telegraph Cable Company*, 71 FCC 2d 393 (1979)(denying under the Cable Landing License Act additional gateway facilities to U.S. carrier wholly-owned and controlled by French government, but reserving the question whether the public interest warrants restricting Section 214 facilities authorizations to U.S. owned and controlled entities).

[18] *See Regulation of International Common Carrier Services, Notice of Proposed Rulemaking*, 7 FCC Rcd 577, 580 (1992); *see also International Services, supra*, at para. 3.

This is a fundamental concern that we share with both Congress and Executive Branch agencies involved in securing greater foreign market access for U.S. entities. We also recognize, as we recently stated in *International Services*, that the long-term solution to foreign market power, which can be abused in the United States with or without a U.S. carrier-affiliate, is greater liberalization in foreign markets. Our expectation is that the success of the U.S. experience will encourage other countries to liberalize their markets. In the meantime, we must balance our open entry goals against the potential for discrimination when reviewing Section 214 applications from affiliates of foreign carriers.

11. The public interest does not necessarily require that we deny the facilities-based entry of a U.S. affiliate of a foreign carrier where, as here, it appears we can craft nondiscrimination safeguards sufficient to protect U.S. carriers in their provision of U.S. international service from discrimination that might occur as a result of such entry and the balance of public interest considerations weigh in favor of granting the applications.[19] Each situation, however, requires an evaluation of the potential for discrimination and the effectiveness of safeguards in preventing anticompetitive abuse. The facilities-based authorizations we approve here to Spain and other countries with foreign carriers affiliated with LD are very limited, and unlikely to serve as a vehicle for anticompetitive conduct. We emphasize that, as part of the nondiscrimination safeguards described *infra* in Section III.C, we will have the opportunity to monitor closely the addition of any circuits to countries where LD is affiliated with a foreign carrier through the Section 214 application process.

12. Nevertheless, there remains some potential for foreign carrier affiliates to abuse their market power to the detriment of unaffiliated U.S. international carriers so long as competitive entry is not permitted in the home markets of those affiliated carriers. We accordingly conclude that we should review in three years the effectiveness of the nondiscrimination safeguards we have adopted and to consider in that context whether the extent of competitive entry in LD's affiliated foreign markets is sufficient to protect against the abuse of market power.[20]

13. We decline to defer consideration of LD's applications, as AT&T requests, pending the adoption of "comprehensive rules and regulations" for entry by foreign carrier affiliates. It is well-settled that the Commission may elect to proceed through rulemaking or the consideration of particular applications in making policy if the issues have been fully aired.[21] As we indicated in *International Services*, we believe the merits of AT&T's and Sprint's substantive arguments can properly be addressed in the context of particular applications filed by the U.S. affiliates of foreign carriers to provide facilities-based end-to-end service from the United States. We have received public comment on LD's applications, and AT&T, Sprint and all other interested parties, including LD, have had the opportunity in this proceeding to brief fully the issues raised by Telefonica's entry into the U.S. telecommunications market. Moreover, as Sprint requests in its comments, we incorporate by reference the record in CC Docket No. 91-360, where AT&T, Sprint and MCI addressed many of the issues raised by LD's applications.[22] Given these procedures, we find it proper not only to consider the merits of LD's applications at this time, but to consider as well AT&T's proposal, both in this proceeding and in CC Docket No. 91-360, that we impose, in addition to our dominant carrier requirements, supplemental safeguards on any authorizations granted LD. As discussed below, in this order we exercise the authority available to us under Section 214 of the Act to impose on the grant of LD's applications certain conditions which we believe are necessary to safeguard competition as a result of Telefonica's ownership and control of LD. We also commit to a review of the safeguards in three years to reevaluate their effectiveness.

B. Review Under the Cable Landing License Act

(1) Positions of Parties

14. As part of this transaction, the Applicants have requested that we amend the cable landing licenses for the TCS-1 and TAINO-CARIB submarine cable systems to substitute LD in place of TLD as a licensee, and assign LD the Section 214 authorizations to provide service over these cables. As noted above, Sprint argues that Section 2 of the Cable Landing License Act requires that we not allow the assignment of TLD's cable landing licenses to LD unless U.S. carriers are permitted reciprocal entry opportunities in Spain.[23]

(2) Discussion

15. Before acting on this part of the transaction, the Commission has sought and obtained the approval of the State Department.[24] The State Department, with the concurrence of the National Telecommunications and Information Administration and the Office of the Assistant Secretary of Defense for Command Control Communications and Intelligence, approved the transfer of TLD's interests in the TCS-1 and TAINO-CARIB cable systems contingent upon the Commission attaching the following conditions to the cable landing licenses: (1) one hundred percent of the ownership and operation of the Isla Verde cable station must be maintained by a U.S. owned and controlled corporation; (2) LD must obtain approval from the Commission for acquisition of any additional capacity in, or transfer of ownership or control of, the TAINO-

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[19] *See infra* paras. 30 and 45.

[20] We observe that our commitment to review the terms of this authorization is not intended to limit the duration of the authorization to three years.

[21] *See Chisholm v. FCC*, 538 F.2d 349, 364-65 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

[22] AT&T notes that LD's applications present the same foreign market power issues which AT&T and other commenters addressed in CC Docket No. 91-360. AT&T Comments at 5.

[23] *See supra* para. 7.

[24] The Cable Landing License Act gives the President of the United States broad discretion to grant, withhold, condition or revoke cable landing licenses in order to protect the interests of the country. *See* Section 2 of the Cable Landing License Act, 47 U.S.C. §35. By executive order, the Commission has been delegated the actual responsibility for issuing cable landing licenses. *See* Executive Order No. 10530, dated May 10, 1954, 3 U.S.C.A. §301 at p. 1052 (1985). However, this delegated authority is subject to the proviso that the Commission may not act on such licenses without first obtaining approval from the Secretary of State, and advice from any executive branch department or establishment of the government it may deem necessary.

CARIB and TCS-1 cables; (3) LD must notify and obtain approval from the Commission to interconnect the TCS-1 or TAINO-CARIB cables to any cable or facilities in any country in which LD, or its parent companies or affiliated companies, acquires ownership or control, either directly or indirectly; (4) competing U.S. carriers must be provided with access on nondiscriminatory rates, terms and conditions to channels and communications circuits that may be made available by or to LD; and (5) prior Commission approval must be obtained for the transfer of the cable landing license, the rights therein granted, or the ownership of the cable itself to any other business entity by LD.[25]

16. The State Department also stated that the foreign ownership and control limitations imposed by the Commission on these submarine cables in the Caribbean must be consistent with those previously imposed on cables in the Atlantic and Pacific. In addition, the State Department expressed concerns about LD's affiliation with Telefonica in light of the fact that the Government of Spain does not permit foreign companies to own or operate international telecommunications facilities in Spain. This is because the Cable Landing License Act states, *inter alia*, that licenses to land or operate cables in the United States may be withheld if it will assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights of the United States or its citizens, in foreign countries. However, the State Department states that since neither the TCS-1 nor TAINO-CARIB cable currently interconnects with cables under Spanish control or landing in Spain, the Department is not required to consider the elements of a direct reciprocity standard at this time.[26]

17. We find the State Department's conditions to be an important part of ensuring other U.S. carriers nondiscriminatory access to these cable facilities, as well as protecting the security of the United States. Further, we believe these conditions will aid the United States Government's efforts to protect against unfair treatment of U.S. companies in foreign telecommunications markets. Therefore, we adopt these conditions as part of the grant of this application.

18. We do not find on the facts of this case that requiring the additional condition of reciprocal entry for U.S. carriers in Spain, as requested by Sprint, is necessary to protect U.S. interests abroad within the meaning of the Cable Landing License Act. Sprint offers no support for the proposition that the Cable Landing License Act mandates that we require reciprocal entry for U.S. carriers in the Spanish market in this case. We note that TLD does not hold any authorizations under the Cable Landing License Act to operate or acquire direct cable facilities to any foreign country in which Telefonica or any of its affiliates operates. We further note that, because LD must obtain this Commission's approval before interconnecting the TCS-1 or TAINO-CARIB cables to any facilities in countries where LD, Telefonica, or any affiliated company acquires ownership or control, either direct or indirect,[27] approval of the proposed transaction does not inhibit our future consideration of the reciprocity issue nor preclude us from acting in the future to ensure that the public interest is served.

C. Nondiscrimination Safeguards

(1) Positions of the Parties

19. Sprint believes that several conditions, in addition to reciprocity, are necessary to address the potential manipulation of traffic and/or accounting rates that might occur as a result of Telefonica's acquisition of a U.S. carrier. Specifically, Sprint requests that we prohibit LD and any affiliated entities from accepting any exclusive arrangements that relate to the handling or interchange of U.S.-originating or -terminating traffic; that we limit LD to accepting only its proportionate share of return traffic from Spain; and that we prohibit LD from receiving inbound U.S. traffic which has been rerouted to Spain from a third country and which, as a result of such rerouting, increases LD's (or any affiliate's) share of U.S.-destined traffic.

20. MCI similarly requests that, at a minimum, LD be constrained to accept operating agreements with Telefonica that contain only standard terms and conditions that are no more favorable to LD than to any competing U.S. service provider. MCI believes such a requirement is necessary to prevent Telefonica and LD from acting in concert to discriminate against unaffiliated U.S. carriers in areas such as return traffic allocations, accounting rates, growth based accounting rates, the introduction of new services, transit arrangements and facilities arrangements. MCI is concerned that such discrimination could occur not only on the U.S.-Spain route, but also with respect to U.S. traffic to and from Chile, Venezuela, and Argentina, where Telefonica also has telecommunications investments.

21. AT&T argues that dominant carrier regulation has not successfully altered the ability of foreign carriers to leverage their market power into the United States.[28] In its initial comments in this proceeding, AT&T proposes that the Commission require LD to comply with the safeguards the Common Carrier Bureau imposed on Atlantic Tele-Network, Inc. ("ATN") in authorizing ATN to provide facilities-based switched services between the U.S. and Guyana, where ATN owns an 80 percent interest in the Guyana Telephone and Telegraph Company. These safeguards relate to return traffic practices, the acceptance of exclusive transit and other arrangements, and our dominant carrier reporting requirements. AT&T also requests that we: (1) require LD to maintain its books of account separately from Telefonica; (2) prohibit LD from jointly owning with Telefonica any switching or transmission facilities; (3) limit LD to using Telefonica's services only pursuant to published tariffs or under the same terms and conditions as are

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[25] *See* Letter to George Li, Chief, International Facilities Division, from Michael T. N. Fitch, Acting United States Coordinator and Director, Bureau of International Communications and Information Policy, United States Department of State dated October 6, 1992.

[26] *But cf.* notes 5 and 8, *supra*, regarding TLD's pending interests in the COLUMBUS II and AMERICAS-1 cable systems.

[27] *See* applications listed in n.5, *supra*.

[28] AT&T Comments at 6. AT&T believes that the ability of foreign carriers to leverage market power in the United States may have increased in recent years, citing a tripling of U.S. carrier settlements to foreign administrations; return traffic practices that favor the foreign carriers' services; delay in the introduction of new services; and use of customer information of U.S. carriers to design global custom services. *See id.* at 8 (citing AT&T Comments in CC Docket No. 91-360 at 4).

made available to other U.S. carriers; and (4) require LD to comply with the Commission's cost allocation, customer proprietary network information and network disclosure rules.

22. In addition, AT&T asks that we design other conditions as may be appropriate in the particular facts of this case. In its comments, it suggests that we address in the context of these applications concerns about above-cost accounting rates and potential anticompetitive pricing of U.S. international service by LD. In a recent *ex parte* submission, AT&T urges that any grant of authority to LD be limited to the particular facts of this case and conditioned on the following safeguards: (1) LD must be limited to the current operation of TLD and it must continue to operate under the same terms and conditions as TLD; (2) LD must divest itself of all facilities-based correspondence with Spain and any other country in which Telefonica controls an affiliate with an actual or effective monopoly; and (3) LD must not engage in discriminatory arrangements with any U.S. or non-U.S. based carrier.[29]

23. LD responds that it does not object to the imposition of reasonable conditions. At the same time, it argues that the ATN application posed very different facts than the instant applications. According to LD, it is significant that ATN had proposed a return traffic allocation that the Bureau specifically had found unacceptable, and that there was some evidence that ATN's foreign affiliate was not receptive to establishing operating relationships with other U.S. carriers. LD also argues that an application for review of the *ATN Order* is now pending and therefore the order is not final.[30] It further asserts that because the commenting parties do not allege any specific illegal or anticompetitive activity by LD or its parent, Telefonica, there is no factual basis for imposing AT&T's proposed conditions in this proceeding. LD states that it is committed to operating in full compliance with all Commission rules, regulations and policies and with all other applicable U.S. laws.

(2) Discussion

24. We note at the outset that LD will be regulated as a dominant, foreign-owned carrier to all authorized foreign points for all authorized international services.[31] Thus, we require LD to comply with the specific dominant carrier requirements set forth in paragraphs 60 through 63 of this order, including the requirement that LD file cost support for all tariffed services to all authorized international points[32] and that LD seek specific Section 214 approval to add circuits or change facilities on certificated routes.[33] We will continue to regulate LD as a dominant, foreign-owned carrier unless and until it can demonstrate, pursuant to our decision in *International Services*, that it qualifies for nondominant regulation on particular routes where it lacks an affiliation with a foreign carrier that has the ability and incentive to discriminate in its favor.

25. In addition, because we cannot rule out the possibility that LD might attempt to gain an unfair competitive advantage by negotiating exclusive arrangements with any foreign carrier or administration, whether or not affiliated with LD, we prohibit LD from agreeing to accept special concessions directly or indirectly from any such entities with respect to traffic or revenue flows between the United States and any other country.[34] We recently adopted this same safeguard in *International Services* to govern the operations of all U.S. carriers with foreign carrier-affiliates within the meaning of that order. Thus, once that decision becomes effective, this safeguard would in any event apply to LD for all routes served as a result of Telefonica's controlling interest in LD.[35] While LD is correct that we have been presented with no evidence to suggest any intent on the part of either LD or Telefonica to engage in illegal or anticompetitive activity, let alone any allegations of such specific activity, we believe the public interest requires the immediate imposition of this safeguard to prevent such activity from occurring.[36]

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[29] *See* Norris Letter, *supra* note 12.

[30] LD additionally objects to consideration of AT&T's proposed conditions in the context of Commission action on these applications. It claims that the only proper forum for resolution of the general policy concerns raised by the commenters, including AT&T's request for conditions to supplement our dominant carrier regulations, is CC Docket No. 91-360. LD Reply at 5-7. As discussed in para. 13 *supra*, we believe that AT&T's proposed conditions are appropriately addressed in this order.

[31] LD does not dispute this conclusion. *See* LD Application for Section 214 authority at 5-6. Under current Commission policy, "foreign-owned" U.S. carriers are regulated as dominant in their provision of all international services to all foreign points. In *International Services, supra*, we modified this policy and determined to focus not on the U.S carrier's foreign ownership *per se*, but on the existence of an affiliation between the U.S. carrier and a foreign carrier that has the ability and incentive to discriminate against unaffiliated U.S. carriers in their provision of U.S. international service to the foreign carrier's home market. Under our modified policy, we will continue to impose dominant carrier regulation on U.S. carriers for the provision of U.S. international service on particular routes where such circumstances exist. *See generally International Services*.

[32] *See* AT&T Comments at 8 n.*. We also require that LD file initial cost support for rates existing on the effective date of this authorization within 60 days of the effective date.

[33] As a nondominant international carrier, TLD has been authorized to add circuits and facilities (except for certain cable and satellite facilities) on certificated routes for its authorized services without additional Section 214 authority. Because, as a dominant carrier, LD is required to seek Section 214 authority to add capacity on particular routes, it is necessary that we freeze at the currently-authorized level, and assign to LD on a route-specific basis, TLD's Section 214 authority to acquire and operate international cable, satellite and microwave circuits on specific facilities. *See* Appendix A. These allocations are based on TLD's projected demand requirements, which it provided in its original applications for these facilities, and which it supplemented in correspondence to the Commission dated November 5 and November 30, 1992.

[34] We define special concession as any arrangement that affects traffic or revenue flows to or from the United States that is offered exclusively by a foreign carrier or administration to a particular U.S. international carrier and not also to similarly situated U.S. international carriers authorized to serve a particular route. This safeguard is essentially equivalent to the nonexclusivity provision imposed on ATN's facilities-based authorization to Guyana, and which AT&T, MCI and Sprint have requested be imposed here. *See ATN Order*, 6 FCC Rcd at 6532-33.

[35] *See International Services, supra*, at para. 27. We also observe that all U.S. carriers are bound by the nondiscrimination requirements of 47 U.S.C. Section 202.

[36] This safeguard should satisfy AT&T's concern that we limit LD to using Telefonica's services only under the same terms and conditions as are made available to other U.S. carriers. *See supra* para. 21. We also note that this safeguard is intended to prohibit the type of discriminatory return traffic practices that

26. In order to ensure further that LD does not manipulate traffic streams or accounting rates by virtue of its relationship with Telefonica or any other foreign carrier, we impose the following additional safeguards, which reflect existing Commission policy. We specifically condition LD's authorizations on LD accepting only its proportionate share of return traffic from any foreign carrier or administration with which it establishes an operating relationship.[37] Moreover, we require as a condition of our authorization that, with respect to U.S.-originating or -terminating traffic to or from LD's certificated points (listed in Appendix A), LD must settle its accounts in accordance with the nondiscriminatory accounting rate it is required to file with this Commission. Finally, we emphasize that the Section 214 certificates that we herein authorize assignment of to LD do not permit LD to route traffic to or receive traffic from third countries for which it does not have a Section 214 certificate.[38]

27. We decline to adopt AT&T's proposal that, in assessing the merits of LD's applications, we consider the accounting rates which LD's affiliated foreign carriers maintain for U.S. carriers.[39] While we are clearly concerned about accounting rate disparities, we recently concluded that, for now, we would rely on mechanisms other than conditioning Section 214 authorizations to encourage foreign correspondents to lower their accounting rates with U.S. carriers. We also reiterated that foreign correspondents must make nondiscriminatory accounting rates available to all competing U.S. carriers.[40]

28. AT&T has also argued that settlement payments, when made between affiliated entities, are "transfer payments" that enable an affiliated U.S. carrier to price its U.S. services without regard to cost.[41] While we recognize AT&T's concern that the above-cost component of accounting rates may be used by a foreign carrier to subsidize its affiliated U.S. carrier's competitive operations in the U.S. telecommunications market, this concern is addressed by our dominant carrier policies, which require that LD provide us with cost support for its tariffed international services. We also note that LD will be operating as a separate corporate entity from Telefonica and other affiliated foreign carriers, with separate books of account which are subject to audit by this Commission.[42] We conclude that such safeguards effectively guard against cross-subsidization abuse, and we therefore find no compelling reason to impose additional conditions to address the cross-subsidy concern raised by AT&T.[43]

29. AT&T additionally requests that we require LD, in dealing with its foreign affiliates, to comply with the customer proprietary network information ("CPNI") and network disclosure rules that ATN stated it would comply with as a result of its affiliation with the local exchange carrier in the U.S. Virgin Islands.[44] We observe, however, that these safeguards were fashioned to govern the relationship between a U.S. local exchange carrier and an affiliated interexchange carrier. They were not intended to apply to a U.S. interexchange carrier in its relation with a foreign carrier, and do not appear appropriate in this context. AT&T does not, either in this proceeding or in CC Docket No. 91-360, provide sufficient facts or explanation to justify why these safeguards would be useful here, or specify what types of anticompetitive conduct they would be designed to prevent.[45] We therefore decline to adopt AT&T's suggestion. However, we are not convinced, as CWCI suggests in CC Docket No. 91-360, that AT&T's concerns have no relevance where a foreign carrier's U.S. affiliate is operating on an end-to-end basis in the U.S. international services market. We therefore note that we are prepared to revisit this issue if presented with a sufficient showing in a future proceeding of general applicability.

30. On balance we believe that the public interest is best served by allowing the assignment to take place with the accompanying safeguards outlined in this order. We conclude that these safeguards should adequately protect

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AT&T alleges could occur as a result of permitting facilities-based entry by a foreign carrier-affiliate. *See* AT&T Comments in CC Docket No. 91-360, at 15-16, wherein AT&T suggests, *inter alia*, that a foreign carrier could sort its return traffic so that its affiliated U.S. carrier receives calls that terminate in cities close to the U.S. carrier's gateway switch, making it less costly for the U.S. carrier to terminate calls and unnecessary to operate a ubiquitous network. *See also* Cable and Wireless Communications, Inc.'s ("CWCI's") Reply in CC Docket No. 91-360, at 16-17 (arguing that such traffic manipulations would be expensive and difficult to deploy and maintain).

[37] This condition merely restates the general obligation of all U.S. international carriers to accept only their proportionate share of return traffic. *See Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, *Second Report and Order & Second Further Notice of Proposed Rulemaking*, FCC 92-496, released November 27, 1992 at para. 30 (*Phase II Order*). In response to the concern raised by Sprint, *supra* para. 19, we clarify that each U.S. carrier shall calculate its proportionate share of return traffic irrespective of whether such traffic is routed to the U.S. carrier directly or indirectly through a third country.

[38] Appendix A of this order lists those countries for which LD is being assigned TLD's Section 214 authority. To the extent TLD has Section 214 authority to route traffic on an "and beyond" basis through any of these countries, we are not assigning that authority to LD. More specifically, we are denying LD "and beyond" authority.

[39] *See* AT&T Comments at 12. *See also* Norris Letter, *supra* note 12.

[40] *See Phase II Order*, *supra*, at para. 32. *See also* Phase I, *Order on Reconsideration*, FCC 92-516, released November 27, 1992, at paras. 15-18. We specifically condition LD's authorization, however, on its compliance with current and future Commission policies and requirements concerning international accounting and settlement rates.

[41] *See* AT&T Comments at 11 n.*; AT&T Comments in CC Docket No. 91-360 at 18-20.

[42] *See* Section 220(c) of the Communications Act, 47 U.S.C. Section 220(c).

[43] We for similar reasons decline to adopt AT&T's proposal that we prohibit LD from jointly owning transmission or switching equipment with an affiliated foreign carrier. *See also infra* para. 30.

[44] These safeguards also were imposed by the Commission on PRTC as a condition of its provision, through TLD, of off-island domestic and international service. *See infra* para. 36.

[45] AT&T appears to be concerned that a foreign carrier could obtain from an unaffiliated U.S. carrier proprietary technical information and provide such information to its affiliated U.S. carrier. It also appears concerned that foreign carriers are using customer information obtained from U.S. carriers to design global custom services. *See* AT&T Comments in CC Docket No. 91-560 at 5, 15-17. AT&T does not, however, provide any specific examples of the type of information it fears might be transferred, or how that information might be used to gain a competitive advantage. We note, moreover, that U.S. carriers would presumably have similar opportunities to obtain proprietary technical and customer information from their foreign correspondents.

against LD acting in concert with Telefonica or any other foreign carrier to discriminate against other U.S. carriers in the terms and conditions of access to foreign markets for the origination and termination of U.S. international traffic. We note that in this particular instance, the potential for anticompetitive harm to U.S. carriers is mitigated by the underlying facts surrounding the assignment. Specifically, the applications involve a limited number of circuits, traffic will only originate from Puerto Rico and the Virgin Islands, and no interconnected private line service is involved. In addition, the privatization of TLD will provide much needed capital for the Puerto Rico government to invest in education.[46] All of these factors, when balanced against potential discrimination concerns, lead us to conclude that a conditioned grant best serves the public interest and should successfully protect against discrimination. We therefore will not adopt in this order AT&T's additional proposal to require that LD divest itself of all facilities-based correspondence with Spain and any other country in which Telefonica controls an affiliate with an actual or effective monopoly. We emphasize, however, that the circumstances of this privatization are unique, and thus additional measures may be required to adequately protect U.S. carriers against discrimination in other contexts. Due to the unique public interest and market factors associated with international facilities-based authorizations, we clarify that facilities applications from entities affiliated with foreign carriers will require review and approval by the full Commission. Each application will be evaluated on a case-by-case basis. Thus, the action in this Order does not constrain the variety of factors the Commission may consider in assessing future applications for facilities-based authorizations.

31. We recognize that there remains some potential in this instance for Telefonica to abuse its market power to the detriment of unaffiliated U.S. international carriers so long as competitive entry is not permitted in Spain. However, it may be that Spain may take future action that will ameliorate the potential for discrimination and negate the need for some of the conditions we adopt herein. Therefore, we commit to review our approach in three years to reevaluate the nondiscrimination safeguards and to adjust them, as necessary, to ensure they are tailored to effectively protect against the potential for abuse of market power.

D. Regulatory Status of LD and TUPR

(1) Positions of the Parties

32. We now address how TUPR[47] and LD will be regulated for both their international and domestic operations. TLD is regulated as nondominant for all authorized domestic and international services. TUPR and LD request that in taking over the operations of TLD they too be found nondominant for all authorized services, except they recognize LD will be dominant for international services. In particular, TUPR states it should be nondominant for international services because: (1) TUPR's level of foreign ownership is 14.9 percent, which is below the 15 percent threshold established in *International Competitive Carrier*;[48] (2) TUPR will have no alien officers or directors; (3) TUPR will provide its carrier's carrier services pursuant to tariff; (4) LD is not obligated to take facilities from TUPR; and (5) TUPR is free to compete with LD for common carrier customers. In addition, TUPR states that it should be nondominant for domestic services even though its controlling parent, PRTA, also owns the Puerto Rico Telephone Company ("PRTC") and the Puerto Rico Communications Corporation ("PRCC"), which provide local exchange services in Puerto Rico. TUPR argues that, like TLD, TUPR meets the criteria for nondominance established in the Commission's domestic *Competitive Carrier* proceeding.[49]

33. The only party to comment on LD's and TUPR's requests for nondominant status is AT&T, which only disputes TUPR's request to be regulated as nondominant for international services. AT&T argues that dominant regulation of TUPR's international operations is required in light of TUPR and LD being owned by the same entities, albeit in different proportions. AT&T suggests that this conclusion is supported by the Commission's new international dominant carrier rules addressed in CC Docket No. 91-360.[50]

(2) Discussion

34. *International Services.* In the 1985 *International Competitive Carrier* decision, which governs here because our *International Services* order is not yet in effect, the Commission declared all foreign-owned carriers to be dominant for the provision of all international common carrier services to all foreign points.[51] The Commission defined as "foreign-

[46] *See infra* para. 45.

[47] We note that TUPR's ownership structure complies with the Commission's alien ownership rules, Section 310(a) and (b) of the Communications Act. Indeed, none of the commenting parties disputes that TUPR's ownership of TLD's Title III radio facilities is consistent with these requirements.

[48] *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985) (*International Competitive Carrier*), *recon. denied* 60 RR 2d 1435 (1986).

[49] Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket 79-252), *Fifth Report and Order*, 98 FCC 2d 1191 (1984), *recon. denied*, FCC 85-572 (released Nov. 20, 1985) (*Competitive Carrier*). In order to qualify for nondominant treatment as a U.S. domestic interexchange carrier, the Commission requires an affiliate of a local exchange carrier to maintain separate books of account, acquire services of the exchange telephone company under tariff, and not own jointly any transmission or switching facilities with the exchange telephone company.

[50] *See* AT&T Comments at 15-16. AT&T's comments were filed on April 10, 1992, several months before the Commission released its decision in CC Docket No. 91-360. As a result, AT&T's comments presuppose that the Commission adopted the standard advocated by AT&T in that docket that any ownership interest between a U.S. carrier and a foreign carrier should result in dominant carrier status. *See id.* at 16. However, because we specifically rejected AT&T's proposed approach in CC Docket No. 91-360 in favor of a standard whereby we will look to see if a U.S. carrier is under common control with a foreign carrier, AT&T's arguments in favor of finding TUPR dominant under the new rules are inapposite.

[51] Unlike their nondominant competitors, foreign-owned U.S. carriers regulated as dominant must: obtain Commission approval before adding circuits on certificated routes; file cost support with their tariffs, which are effective only after 45 (as opposed to 14) days notice; and report quarterly (as opposed to annually) on traffic and revenues. *See International Services*, *supra*, at n.4.

owned" any U.S. carrier that: (1) is more than fifteen percent directly or indirectly owned by a foreign telecommunications entity; or (2) has on its board of directors an employee, agent or representative of a foreign telecommunications entity.[52] Under this standard LD is clearly dominant due to the 79 percent ownership interest maintained by Telefonica.[53] However, TUPR states that it should be nondominant under this standard, and we agree. TUPR's foreign ownership is below the 15 percent benchmark, and it represents that it will comply with the Commission's other criteria for nondominance. In particular, there is no evidence in the record that Telefonica will play an active role in managing the affairs of TUPR. However, we note that the Commission retains the ability to change TUPR's regulatory status on our own motion or in response to filings of interested parties if we determine that TUPR no longer meets the threshold criteria for nondominance or we otherwise find full regulatory oversight best serves the public interest.[54]

35. *Domestic Services.* We find that LD and TUPR should be treated as nondominant for all authorized domestic services, provided they both comply with the nondominance criteria established in the Commission's *Fifth Report and Order* in the domestic *Competitive Carrier* proceeding. In that proceeding, we found that carriers that were "affiliated"[55] with an exchange telephone company must comply with the *Fifth Report and Order* safeguards to maintain nondominant status. We have previously required TLD, because of its affiliate relationship with PRTC and PRCC, to operate under these safeguards in order to maintain nondominant status. As successors to TLD, we will require LD and TUPR to operate under these same safeguards. Both TUPR and LD will still be considered "affiliated" with PRTC and PRCC under our *Fifth Report and Order* since all four carriers are in whole (PRTC, PRCC) or in part (LD and TUPR) under the common ownership of PRTA. Therefore, TUPR and LD must both comply with the following safeguards: (1) TUPR and LD shall own no transmission or switching facilities jointly or in common with either PRTC or PRCC; (2) TUPR's and LD's books of account will be entirely separate from those of PRTC and PRCC; (3) any services and facilities that PRTC or PRCC offers pursuant to tariff will be obtained by TUPR and LD pursuant to those tariffs; and (4) TUPR and LD will also obtain any other PRTC or PRCC services on an arms length, nondiscriminatory basis.

E. Regulation of LD's and TUPR's Relationship with PRTC

(1) Introduction

36. When the Commission first authorized PRTC to provide interstate and international telecommunications services, it imposed nonstructural safeguards on PRTC to minimize potentially unfair competitive advantages from accruing to PRTC as a local exchange carrier providing off-island services on an integrated basis with its local and other intra-island services.[56] These safeguards included accounting and cost allocation requirements, and information disclosure safeguards regarding network disclosure, customer proprietary network information, and business and residence telephone lines information. Subsequent to the *Puerto Rico Order,* PRTA established TLD as a separate PRTA subsidiary in order to provide interstate and international off-island services in place of PRTC. However, PRTC still has been required to comply with the conditions originally applied to it in the *Puerto Rico Order* in its relationship with TLD.[57] Now that TUPR and LD will be taking the place of TLD in offering off-island telecommunications services, the question arises whether PRTC must still comply with the *Puerto Rico Order* safeguards in its dealings with TUPR and LD.

(2) Positions of the Parties

37. AT&T argues that LD and TUPR must operate under the same nonstructural safeguards imposed upon TLD and PRTC by the Commission in its 1987 *Puerto Rico Order.*[58] AT&T states that the proposed ownership structure of LD and TUPR does not alter the potential for discrimination in favor of them by PRTC because all these companies will continue to have common ownership through the same parent, PRTA. The Applicants respond that the *Puerto Rico Order* established nonstructural safeguards that PRTC, not TLD, would be required to meet if it chose to offer interstate message telecommunications services on its own, and not through a separate affiliate or subsidiary. Therefore, the Applicants argue that those conditions are inapplicable here for two reasons. First, they state TUPR will not provide message telecommunications services. Second, they state that, unlike PRTC's original proposal, TUPR will be a separate subsidiary subject to all of the requirements for nondominance established in the *Fifth Report and Order.* Finally, they state that it is unclear to what AT&T refers when it states that LD must also operate under the conditions of that order.

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[52] In addition, the Commission recognized that some small ownership interests may not be passive and, thus, may warrant the imposition of dominant carrier status. The Commission also recognized that ownership interests over 15 percent could be passive, warranting nondominant status. *International Competitive Carrier,* 102 FCC 2d at 842, n.74.

[53] *See supra,* para. 24.

[54] *International Competitive Carrier,* 102 FCC 2d at 842, n.74. In particular, we note that TUPR will lose its nondominant status if at any time we find that an employee, agent or representative of Telefonica has been appointed to the board of directors of TUPR, or Telefonica otherwise takes an active role in the affairs of TUPR. *See FTC Communications, Inc.,* 2 FCC Rcd 7513 (Com. Car. Bur. 1987)(nondominant status denied to U.S. carrier which was 14.9% owned by a foreign carrier, and the foreign carrier had the right to elect one of the five members of the U.S. carrier's board of directors).

[55] A carrier is affiliated with an exchange telephone company when it "is owned (in whole or part) or controlled by, or under common ownership (in whole or part) or control with the exchange telephone company." *Fifth Report and Order,* 98 FCC 2d at 1198.

[56] *See Common Carrier Facilities Off of the Island of Puerto Rico,* 2 FCC Rcd 6600, 6611 (1987)(*Puerto Rico Order*), *on recon.,* FCC 92-529 (adopted November 25, 1992).

[57] *See Puerto Rico Telephone Authority,* 3 FCC Rcd 5675, 5677 (Com. Car. Bur. 1988); *La Telefonica Larga Distancia de Puerto Rico,* 3 FCC Rcd 5937, 5940 n.8 (Com. Car. Bur. 1988); *Telefonica Larga Distancia de Puerto Rico,* 4 FCC Rcd 4496, 4497 (Int. Fac. Div. 1989).

[58] *See* AT&T Comments at 14, n.*; *see also* Norris Letter, *supra* note 12.

(3) Discussion

38. We agree with AT&T that the *Puerto Rico Order* safeguards should still apply to PRTC in its affiliate relationships with TUPR and LD. Since PRTA owns 100 percent of PRTC, and part interests in LD and TUPR, it has a financial incentive in seeing that all three affiliates succeed. Applying the *Puerto Rico Order* safeguards to PRTC to govern its relationship with both LD and TUPR provides protection against anticompetitive and discriminatory behavior by PRTC against other unaffiliated carriers. It also provides protection against TUPR and LD cross-subsidizing their activities with PRTC ratepayer revenues. Therefore, the conditions imposed on the participation of PRTC and TLD in the provision of off-island services in *Puerto Rico Order* (as amended in the reconsideration order)[59] and *Puerto Rico Telephone Authority*[60] shall be imposed on this authorization.

F. Private Line Resale

(1) Introduction

39. TUPR's Section 214 application, as originally filed, requests authority to provide international private line service between Puerto Rico and several listed countries. TUPR states it will offer these services to LD and other common carriers pursuant to tariff. However, this raises the issue of whether LD and other common carriers that take service from TUPR will be in violation of the Commission's *International Resale Order*[61] if these carriers use TUPR's facilities to provide switched services to their own customers.

40. None of the commenting parties address this issue. On November 5, 1992, TUPR's counsel filed a letter clarifying the type of service TUPR proposes to offer. According to the letter, TUPR will lease capacity on its earth station and point-to-point microwave radio facilities on a common carrier basis to other common carriers. TUPR will not have correspondent agreements with foreign telecommunications entities, and will not be authorized to provide service to any foreign countries. To the extent that TUPR engages in direct discussions with any foreign telecommunications entities or international space segment providers, those discussions will address matters required for technical coordination of the facilities involved; TUPR would in any event be acting on behalf of the carrier leasing capacity in its facility and actually interchanging traffic with the relevant foreign telecommunications entity or space segment provider.

(2) Discussion

41. Since TUPR will not have any correspondent agreements, nor be authorized under Section 214 of the Communications Act to provide service to any particular countries, it will not have the ability to offer end-to-end services such as international private lines. Thus, U.S. carriers that use TUPR's facilities to provide switched services to others would not be reselling a private line service. Such carriers would merely subscribe to the facilities of TUPR to provide switched services pursuant to their own operating agreements with foreign carriers and subject to the conditions of proportionate return and compliance with the International Settlements Policy. Thus, U.S. carriers taking service under TUPR's tariff will not be in a position to evade the settlements process through "one-way" resale of TUPR's service.[62] The Commission decided to require equivalency as a condition of private line resale in order to prevent an evasion of the settlements process through "one-way" resale. Because TUPR's offering does not present the problems of "one-way" resale, we conclude that the equivalency standard adopted in the Commission's *International Resale Order* does not apply here.

G. Other Public Interest Considerations

(1) Positions of the Parties

42. The Applicants assert that grant of these applications is in the public interest because it will further the privatization of the telephone system in Puerto Rico, and the proceeds of the sale will go towards improving the Puerto Rico education system. However, the minority party delegation to the Puerto Rico House of Representatives, as well as several private citizens of Puerto Rico, have objected to the sale of TLD to LD because it is controlled by Telefonica.[63] Specifically, they object because Telefonica is controlled by the Spanish government. In addition, they allege Telefonica has the worst service record among phone companies in Europe, and has engaged in illegal wiretapping and intelligence gathering activities in Spain. The Applicants respond that: (1) the ownership structures presented by these applications are totally consistent with both the Communications Act and the Commission's policies; (2) the fears regarding quality of service are unfounded because, in the highly competitive Puerto Rico market, Telefonica must provide high quality service to succeed; and (3) Telefonica has never been charged with, let alone been convicted of, a violation of the wire-tapping laws of Spain. The Applicants state that Telefonica, and its subsidiary, LD, are fully prepared to comply with all applicable laws, regulations and policies in the United States; and will provide the highest quality service possible.

(2) Discussion

43. We have not been presented with any substantiated evidence that Telefonica has been engaged in illegal activities abroad, nor been given any reason to believe that it will do so in the United States through its affiliate LD. Even assuming that the informal commenters are correct with respect to Telefonica's service record, we do not con-

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[59] *Puerto Rico Order, supra.*

[60] *Puerto Rico Telephone Authority*, 3 FCC Rcd at 5677.

[61] *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991)(*International Resale Order*), *modified in part on recon.* FCC 92-517, (released November 27, 1992)(applicants seeking authorization under Section 214 to resell international private lines for switched services to a particular country must demonstrate that the subject country affords resale opportunities equivalent to those available under U.S. law).

[62] "One-way" resale occurs when entities in a foreign country are able to resell private lines into the United States, and connect these private lines to the U.S. public switched network, while at the same time the foreign correspondent does not allow private lines resold in the United States to be connected to the foreign country's public switched network. Such unilateral resale can be used to evade the international settlements process. *See International Resale Order, supra*, at paras. 17-20.

[63] Congressman Lagomarsino forwarded copies of two of these letters, adding his concerns about the transaction.

sider it probative of how LD could be expected to operate in the Puerto Rico market. We agree with the Applicants that in the highly competitive Puerto Rico market, Telefonica must provide high quality service to succeed.

44. In addition, we are satisfied that the requirements and limitations we are imposing as a condition of authorizing this transaction are sufficient at this time to safeguard competition. Given the limits imposed on our authorization to LD, we will have the opportunity to attach additional conditions, where warranted, should LD seek to expand its U.S. international service offerings or capabilities. We also reserve the right to impose additional conditions on LD's authorized operations if, after due notice and comment, such conditions are warranted. We commit to review at the end of three years the effectiveness of the nondiscrimination safeguards we have imposed.

45. Finally, we emphasize that it has been the Commission's policy to favor private ownership of international facilities.[64] Here, we believe privatization of TLD will encourage competition, lower rates, and bring better service to the public. Therefore, the Commission welcomes the Puerto Rico government's efforts to privatize TLD in an effort to improve telecommunications services in Puerto Rico. In addition, grant of these applications will ensure that the citizens of Puerto Rico reap the benefits of a long-planned privatization. Until Telefonica's bid for TLD, the Puerto Rico Government had been unsuccessful in locating a qualified buyer willing to offer a reasonable price for TLD.[65] Once this transaction is consummated, the Puerto Rico Government has stated that the proceeds from the sale of TLD will go towards education reform in Puerto Rico.[66] This factor is critical in our analysis of the public interest benefits associated with a grant of the proposed assignment. Accordingly, for the reasons stated above, we find that a grant of these applications, as conditioned in this order, is in the public interest.

IV. ORDERING CLAUSES

46. Upon consideration of the subject applications, IT IS ORDERED that applications, File Nos. CSG-92-067-AL, 1022-DSE-AL-92(10) and C4-92-001-AL ARE GRANTED and Telefonica Larga Distancia de Puerto Rico is authorized to assign its Title III international and domestic fixed earth station licenses and its international fixed public point-to-point telegraph and telephone station license to Telecomunicaciones Ultramarinas de Puerto Rico, as listed in Appendix B.

47. IT IS FURTHER ORDERED that application File No. I-T-C-92-121 is GRANTED and it is CERTIFIED, pursuant to 47 U.S.C. §214, that the present and future public convenience and necessity require the provision by Telecomunicaciones Ultramarinas de Puerto Rico of international and domestic fixed earth station and international fixed public point-to-point telegraph and telephone station facilities to other common carriers.

48. IT IS FURTHER ORDERED that application File No. I-T-C-92-116-AL is GRANTED, and Telefonica Larga Distancia de Puerto Rico is authorized to assign its Section 214 authorizations to LD Acquisition Corporation for the provision of international message telephone service, International Business Service and international television service, and the TCS-1 and TAINO-CARIB cable landing licenses are modified to substitute LD Acquisition Corporation in place of Telefonica Larga Distancia de Puerto Rico.

49. IT IS FURTHER ORDERED that all of Telefonica Larga Distancia de Puerto Rico's interests in pending applications for Section 214 authorizations and cable landing licenses are assigned to LD Acquisition Corporation.

50. IT IS FURTHER ORDERED that one hundred percent of the ownership and operation of the Isla Verde, Puerto Rico cable station for the TAINO-CARIB cable system must be maintained by a U.S. owned and controlled corporation.

51. IT IS FURTHER ORDERED that LD Acquisition Corporation must obtain approval from the Commission for acquisition of any additional capacity in, or transfer of ownership or control of, the TAINO-CARIB and TCS-1 cables.

52. IT IS FURTHER ORDERED that LD Acquisition Corporation must notify and obtain approval from the Commission to interconnect the TCS-1 or TAINO-CARIB cables to any cable or facilities in any country in which LD Acquisition Corporation, or its parent companies or affiliated companies, has or acquires ownership or control, either directly or indirectly.

53. IT IS FURTHER ORDERED that competing U.S. carriers must be provided access on nondiscriminatory rates, terms and conditions to channels and communications circuits that may be made available by or to LD Acquisition Corporation.

54. IT IS FURTHER ORDERED that prior Commission approval must be obtained for the transfer of the TAINO-CARIB and/or TCS-1 cable landing licenses, the rights therein granted, or the ownership of the cables to any other business entity by LD Acquisition Corporation.

55. IT IS FURTHER ORDERED that no material changes inconsistent with this or any other relevant Commission order shall be made before final execution of any necessary operating agreements between the applicant and its correspondents and copies of the agreements shall be filed with the Commission within 30 days of their execution.

56. IT IS FURTHER ORDERED that LD Acquisition Corporation shall not agree to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the U.S. and any country.

57. IT IS FURTHER ORDERED that LD Acquisition Corporation shall not route traffic to or from third countries for which it does not have authorization under Section 214 of the Communications Act.

58. IT IS FURTHER ORDERED that LD Acquisition Corporation shall not bargain for nor agree to accept more than its proportionate share of return traffic from any country.

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[64] *See e.g. Puerto Rico Order, supra*, at 6613; *RCA Global Communications, Inc.*, 56 FCC 2d 660, 692-93 (1976); *Comsat Study*, 77 FCC 2d 564, 694 (1980).

[65] *See* "Spaniards to buy Larga Distancia," The San Juan Star, Feb. 7, 1992, p.12.

[66] *See* LD Application for Section 214 authority at p. 8; *see also* "$141 million from TLD sale will go to Education Reform," The San Juan Star, Mar. 31, 1992, p.2.

59. IT IS FURTHER ORDERED that LD Acquisition Corporation shall settle its international accounts in accordance with the nondiscriminatory accounting rate it is required to file with this Commission.

60. IT IS FURTHER ORDERED that LD Acquisition Corporation shall comply with any current and future Commission policies and requirements concerning international accounting and settlement rates and shall file copies of any operating agreements entered into by LD Acquisition Corporation or its parent/affiliates that affect traffic or revenue flows to or from the U.S. within 30 days of its execution.

61. IT IS FURTHER ORDERED that LD Acquisition Corporation shall seek, pursuant to Section 63.01 of the rules, additional authorization under Section 214 of the Communications Act before adding or deleting circuits to certificated points, or before otherwise using the circuits listed in Appendix A of this order in a manner other than as specified in that appendix for the provision of the services authorized herein.

62. IT IS FURTHER ORDERED that LD Acquisition Corporation shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the United States and each country LD Acquisition Corporation is authorized to serve within 90 days from the end of each calendar quarter.

63. IT IS FURTHER ORDERED that LD Acquisition Corporation and Telecomunicaciones Ultramarinas de Puerto Rico shall file tariff provisions pursuant to Section 203 of the Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order. In addition, LD Acquisition Corporation shall file initial cost support for its tariff rates existing on the effective date of this authorization within 60 days of the effective date.

64. IT IS FURTHER ORDERED that LD Acquisition Corporation shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

TELEFONICA LARGA DISTANCIA DE PUERTO RICO §214 AUTHORIZATIONS

Destination	Cable[1]	Microwave[2]	Satellite[3]	Total
Anguilla		4		4
Antigua		6		6
Argentina			10	10
Barbados		5		5
Bermuda	6[4]			6
Brazil			5	5
British Virgin Islands	810[5]	62[6]		872
Canada	28[7]		11	39
Chile			8[8]	8

Destination	Cable	Microwave	Satellite	Total
Colombia	31		9	40
Costa Rica			5	5
Dominica		3		3
Dominican Rep.	30	120[9]	166	316
El Salvador			2	2
France			3	3
Germany			9	9
Grenada		3		3
Guadalupe		4		4
Guatemala			3	3

[1] International services provided via cable circuits are routed through the Transcaribbean Cable System ("TCS-1"), except as discussed in notes 4, 5, 7, 10, and 12 below. *See Puerto Rico Telephone Company et al.*, 5 FCC Rcd 100 (1990); *Puerto Rico Telephone Company*, 5 FCC Rcd 4873 (1990); and *Telefonica Larga Distancia de Puerto Rico*, 5 FCC Rcd 7582 (1990).

[2] International services provided via microwave circuits are derived from TLD's §214 authorization to acquire, on an IRU basis (or lease), a one-half interest in and operate these circuits in the Digital Eastern Caribbean Microwave System between Tortola, British Virgin Islands and the country listed, except as discussed in notes 9 and 13 below. *See Telefonica Larga Distancia de Puerto Rico*, 6 FCC Rcd 4987 (1991).

[3] International satellite circuits are provided by use of the Humacao international earth station. *See La Telefonica Larga Distancia de Puerto Rico*, 3 FCC Rcd 5937 (1988).

[4] TLD has been authorized to acquire, on an IRU basis (or lease), a one-half interest in and operate six-voice grade circuits in the CARAC cable between Tortola, British Virgin Islands and Bermuda to provide its regularly authorized services. *See Telefonica Larga Distancia de Puerto Rico*, 6 FCC Rcd 4987 (1991).

[5] These circuits have been authorized in the TAINO-CARIB Cable System. *See Telefonica Larga Distancia de Puerto Rico et al.*, 7 FCC Rcd 4266 (1992) and *Telefonica Larga Distancia et al.*, 7 FCC Rcd 4275 (1992).

[6] TLD has been authorized to acquire, on an IRU basis (or lease), a one-half interest in and operate 62 voice-grade circuits in the St. Thomas-Tortola Microwave Link. *See Telefonica Larga Distancia de Puerto Rico*, 6 FCC Rcd 4987 (1991).

[7] Sixteen of these circuits are authorized to TLD to be acquired on an IRU basis and operated in the Third Florida-St. Thomas cable. TLD is also authorized to acquire connecting facilities between San Juan, Puerto Rico and the United States-Canada border for the joint provision with Teleglobe Canada of IMTS between Puerto Rico and Canada. *See La Telefonica Larga Distancia de Puerto Rico*, 3 FCC Rcd 5937 (1988).

[8] TLD received §214 authority to operate eight international satellite circuits via the Humacao earth station to Chile on June 8, 1992. *See Telefonica Larga Distancia de Puerto Rico*, 7 FCC Rcd 3556 (1992).

[9] International microwave circuits are provided by use of the point-to-point microwave facility between Monte del Estado, Puerto Rico, and Otra Banda, Dominican Republic. *See La Telefonica Larga Distancia de Puerto Rico*, 3 FCC Rcd 5800 (1988); *see also* Letter to Troy Tanner, FCC, from J. Clifford Frazier, counsel for TLD, dated December 11, 1992.

Haiti	12			12
Honduras			3	3
Israel			3	3
Italy			5	5
Jamaica	18			18
Martinique		3		3
Mexico	12		13	25
Monserrat		4		4
Nevis		4		4
Nicaragua			2	2
Panama			8	8
Peru			3	3
Spain	8[10]		12	20
St. Kitts		4		4
St. Lucia		4		4
St. Vincent		4		4
Switzerland			2	2
Trinidad & Tobago		8		8
United Kingdom			6	6
United States (mainland)	150[11]			150
U.S. Virgin Islands	7,140[12]	24[13]		7,164
Venezuela			14	14

APPENDIX B

TELEFONICA LARGA DISTANCIA DE PUERTO RICO: TITLE III INTERNATIONAL AND DOMESTIC FIXED EARTH STATION AUTHORIZED ASSIGNMENTS

Call Sign	Location	File Number
1. –	Humacao, PR	CSG-85-048-P
2. E4488	Campo Rico, PR	1640-DSE-P/L-82
3. E5500	Caguas, PR	781-DSE-P/L-83
4. E6521	Las Piedras, PR	93-DSE-P/L-84
5. E861041	San Juan, PR	1925-DSE-P/S-86
6. E865099	Manati, PR	5099-DSE-P/L-86
7. E872647	Humacao, PR	1557-DSE-P/L-90
8. E880576	San German, PR	1130-DSE-P/L-88
9. E880577	Aguadilla, PR	1131-DSE-F/L-88
10. E881154	San Juan, PR	2484-DSE-P/L-88
11. E910100	Humacao, PR	259-DSE-P/L-91

TELEFONICA LARGA DISTANCIA DE PUERTO RICO: INTERNATIONAL FIXED PUBLIC POINT-TO-POINT TELEGRAPH AND TELEPHONE STATION

Call Sign	Location	File Number
WLU550	Monte del Estado, PR	C4-89-002-L

[10] Services to Spain are provided via circuits in the VENEZ-2 Cable System from St. Thomas, U.S. Virgin Islands to Venezuela, connecting with circuits in the COLUMBUS I Cable System to Spain. TLD is leasing half circuits from AT&T to Venezuela, and the rest of the circuits are leased from CANTV (the Venezuelan carrier). The Puerto Rico to St. Thomas segment of the traffic is carried on microwave circuits leased from AT&T. TLD was not required to obtain specific §214 authorization to provide service to Spain via these cables because it is nondominant, and already had direct facilities authority to Spain. *See* Letter to Susan O'Connell, FCC from Paul Berman, counsel for TLD, dated November 5, 1992.

[11] TLD originally was authorized to acquire 990 MAUOs in the Puerto Rico to Florida segment (Segment F) of TCS-1 to be used for domestic private line service between Puerto Rico and the U.S. mainland. *See Puerto Rico Telephone Company et al.*, 5 FCC Rcd 100 (1990). Subsequently, TLD was authorized to use 150 of these 990 MAUOs for the provision of all regularly authorized international services between Puerto Rico and the overseas points TLD is authorized to serve. TLD has allocated 12 of these circuits for service to Mexico and 12 for service to Canada. TLD has allocated the remaining 126 circuits for interconnection to other common carrier switches for the provision of TLD's regularly authorized international services on a resale basis. *See Telefonica Larga Distancia de Puerto Rico*, 5 FCC Rcd 7582 (1990); *See also Telefonica Larga Distancia de Puerto Rico*, 4 FCC Rcd 4496 (1989)(§214 authorization to resell the services of MCI, AT&T and Sprint).

[12] These circuits have been authorized in the TAINO-CARIB Cable System. *See Telefonica Larga Distancia de Puerto Rico et al.*, 7 FCC Rcd 4266 (1992) and *Telefonica Larga Distancia et al.*, 7 FCC Rcd 4275 (1992).

[13] TLD has been authorized to lease and operate one T-1 channel (24 circuits) in AT&T's microwave facilities between Puerto Rico and Magens Bay, U.S. Virgin Islands for the provision of its regularly authorized services between the U.S. Virgin Islands and those international locations it is authorized to serve from Puerto Rico. *See Telefonica Larga Distancia de Puerto Rico*, 7 FCC Rcd 4315 (1992).

Separate Statement
of
Commissioner James H. Quello

Re: Telefonica Larga Distancia

I have voted to support the assignment of LD Acquisition to Telefonica because I believe that open entry, appropriately conditioned as in this case, will ultimately be the best way to encourage competition and lower prices to U.S. customers. Simply put, this transaction should prove to be a very good deal for all those immediately involved.

At the same time, however, I have been, and I remain, concerned that our open entry policy is not matched by the government of Spain, which controls Telefonica. I will, therefore, watch not only the service provided to and from Puerto Rico, but also how Spain treats facilities-based U.S. carriers seeking entry over the next several years, with the expectation that our generous entry policy will be mirrored by Spain in the future.

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December 21, 1992

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

In re: Assignment of License from Telefonica Larga Distancia de Puerto Rico to LD Acquisition Corp.

I support this Order to allow LD Acquisition Corp.[LD], 79% owned by Telefonica de Espana [Telefonica], to acquire the non-Title III assets of Telefonica Larga Distancia de Puerto Rico [TLD]. Title III radio assets also are being transferred to a U.S. controlled TLD affiliate, Telecomunicaciones Ultramarinas de Puerto Rico [TUPR], with is 14.9% owned by Telefonica. The conditions imposed on the transfer of these assets should allow the Commission to assess the public interest concerns raised by this transaction. In addition, the Order clarifies that future facilities applications from entities affiliated with foreign carriers will require review and approval by the full Commission. Each application will be evaluated on a case-by-case basis. Thus, the Commission will continue to review a variety of factors in assessing future applications for facilities-based authorizations.[1]

International facilities-based applications involve important and complicated issues. At this point, these issues warrant full Commission review as future applications are filed. Thus, I am satisfied that the Order clarifies a full Commission review requirement in this regard.

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[1] See, Memorandum Opinion, Order, Authorization and Certificate, at 16, para. 30.

December 23, 1992

Separate Statement

of

Commissioner Ervin S. Duggan

In re: Applications of Telefonica Larga Distancia de Puerto Rico, LD Acquisition Corporation, and Telecomunicaciones Ultramarinas de Puerto Rico (I-T-C-92-116-AL, CSG-92-067-AL, 1022-DSE-AL-92(10), C4-92-001-AL, I-T-C-92-121)

I am concerned, and long have been, about strengthening the United States' ability to open foreign telecommunications markets to U.S. companies. On October 8, in a joint separate statement that Commissioner Marshall and I issued in the "dominant carrier" proceeding, we observed that too many foreign markets remain closed to entry by U.S. companies, and that international accounting rates remain well above cost in many countries.[1] While Commissioner Marshall and I voted to approve streamlined regulatory treatment for some foreign-owned carriers in that decision, we also stressed that the dominant carrier decision did not address "the question of appropriate market entry standards for foreign facilities-based carriers."[2] I believe that we must examine closely all Section 214 requests seeking approval for foreign carriers to enter the U.S. market with an eye to ensuring that U.S. interests are protected.

The application of Telefonica de Espana, the Spanish government-owned telephone company, to acquire a controlling interest in the long distance operations of the Puerto Rican Telephone Authority, is the first application for authority to enter the U.S. market that the Commission has considered since adopting the dominant carrier decision.

I have concluded that I can support the Spanish government-owned telephone company's acquisition of a U.S. carrier, because the balance of public interest factors weighs in favor of approval. But I am seriously concerned about the largely closed nature of telecommunications markets in Spain, and therefore I am also supporting the imposition of some firm conditions along with our approval in order to guard against discrimination by Telefonica and its affiliated carriers against U.S. companies.

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1 Regulation of International Common Carrier Services, CC Docket No. 91-360, FCC 92-463 (released November 6, 1992).

2 Joint Statement at 2.

This transaction, to be sure, does offer unique public interest benefits. The transaction enables the government-owned telephone company in Puerto Rico to privatize a large part of its operations, consistent with U.S. policy favoring private ownership of international facilities. Until Telefonica expressed interest, the Puerto Rican government had found it difficult to find a buyer for these facilities at a reasonable price. Moreover, the proceeds from this sale will go to finance educational progress in Puerto Rico: a definite public-interest victory.

It is also significant, in my view, that only a limited amount of international facilities-based service will be authorized for Telefonica's affiliate as a result of this decision. Any future requests for facilities-based service authorization will be reviewed, on a case-by-case basis, by this Commission in separate Section 214 proceedings.

Finally, we have undertaken to review after three years the effectiveness of the conditions we have imposed in preventing discrimination, and to refine those conditions if appropriate.

Taking these facts into account, I believe that the public interest justifies grant of this application. I stress that each such application that comes before us should receive similar scrutiny. Only thus, in my judgment, can we strengthen the United States' ability to open of foreign markets and reinforce U.S. carriers' ability to negotiate lower accounting rates.

# # # #

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-141

In the Matter of

Expanded Interconnection
with Local Telephone
Company Facilities

ORDER

Adopted: December 18, 1992; Released: December 18, 1992

By the Commission: Chairman Sikes concurring in the result.

I. INTRODUCTION

1. Four petitions have been filed requesting stay of various provisions of the *Expanded Interconnection Order* adopted in this proceeding on September 17, 1992.[1] Nine local exchange carriers (the Joint LECs)[2] request that the Commission stay the mandatory physical and virtual collocation requirements in the *Order*, and that instead, the LECs provide their choice of physical or virtual collocation only in response to bona fide requests. Ameritech also seeks stay of the physical collocation requirement, but not of the virtual collocation requirement. Southwestern Bell (SW Bell), one of the Joint LECs, has filed a separate petition requesting stay of our virtual collocation requirement. Bell Atlantic requests stay of the "fresh look" provisions of the *Order*. Numerous parties filed oppositions to the stay requests.[3] For the reasons discussed below, we deny all four petitions.

II. BACKGROUND

2. In the *Expanded Interconnection Order*, we concluded that LEC provision of expanded interconnection would serve the public interest. Specifically, we found that increased competition resulting from expanded interconnection should increase incentives for LEC efficiency and customer responsiveness, foster the deployment of new technology, increase customer choice, and reduce prices for LEC services subject to competition.[4] We also concluded that the LECs should be required to implement expanded interconnection by making physical collocation available to all interconnectors that request it, although we allowed LECs to negotiate virtual collocation arrangements.[5] We found that requiring physical collocation was a legitimate exercise of Commission authority and that it did not violate the Fifth Amendment.[6] Finally, we concluded that certain LEC customers with long-term access arrangements should be permitted to take a "fresh look" at alternative offerings once expanded interconnection became operational, and limited the termination penalties applicable to such customers.[7]

III. COLLOCATION STAY PETITIONS

A. Physical Collocation

1. Arguments of the Parties

3. The parties seeking stay of the physical collocation requirement contend that they will be successful in challenging this rule on appeal. They argue that the Commission lacks authority to engage in a taking and that mandatory physical collocation constitutes a *per se* taking in violation of the Fifth Amendment. They also argue that the Commission has failed to explain its departure from prior decisions declining to order physical collocation. Petitioners claim that they will suffer irreparable injury if a stay is not granted because of the costs of surveying all central offices for space availability and of preparing exemption applications and cost-based tariffs. The Joint LECs contend that more than 10,000 central offices will be subject to these requirements. Bell Atlantic estimates that its costs alone will be $2.7 million. In addition, petitioners allege that while physical collocation is in effect it will result in increased costs to ensure security, less control of central office space, and potential disruption of LEC operations.[8] Petitioners contend that because the Commission lacks authority to take property, they will not be able to obtain just compensation under the Tucker Act.[9] Petitioners also argue that money damages are inadequate to compensate for injury to their unique real property interests.

4. The Joint LECs contend that a stay of the physical collocation requirement would not substantially harm potential interconnectors because the LECs would still offer their choice of physical or virtual collocation in individual offices upon a bona fide request. Ameritech stresses that it

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[1] *Expanded Interconnection with Local Telephone Companies*, CC Docket No. 91-141, FCC 92-440 (released October 19, 1992) (*Expanded Interconnection Order* or *Order*).

[2] The Joint LECs include: Bell Atlantic, BellSouth, Cincinnati Bell, GTE, Lincoln Telephone, Pacific Telesis, Southern New England Telephone, SW Bell, and United.

[3] The following parties filed oppositions to the Joint LEC, Ameritech and Bell Atlantic petitions: Association for Local Telecommunications Service, Cox Teleport, Electric Lightwave, Intermedia Communications of Florida, MCI, MFS Communications, Teleport Communications Group, and Teleport Denver. SW Bell filed comments on the Bell Atlantic petition. No parties filed separate oppositions to SW Bell's petition.

[4] *Expanded Interconnection Order* at ¶ 14. *See also* ¶ ¶ 2 & 15-18.

[5] *Expanded Interconnection Order* at ¶ ¶ 39-40.

[6] *Expanded Interconnection Order* at ¶ ¶ 230-240.

[7] *Expanded Interconnection Order* at ¶ ¶ 199-203.

[8] For example, Ameritech claims that it may not be able to enforce company fire prevention policies against interconnectors. The Joint LECs and Ameritech also contend that they will be unable to move or close central offices without impacting interconnectors.

[9] The Tucker Act, 28 U.S.C. § 1491(a)(1), gives the United States Court of Claims jurisdiction over claims against the United States founded upon the Constitution or an Act of Congress.

will continue to offer virtual collocation. Petitioners claim that a stay would not harm the public interest because the collocation requirements are likely to be vacated on appeal or reconsideration, and a stay would avoid the confusion that would result if mandatory physical collocation were allowed to proceed and then were overturned later. The Joint LECs also argue that staying physical collocation would serve the public interest by allowing the Commission to modify its decision, providing the states with additional time to select a collocation arrangement, and avoiding implementation costs in offices that will not be used by interconnectors.

5. The parties opposing the petitions for stay argue that the LECs will not prevail on the merits because mandatory physical collocation constitutes valid economic regulation of public utilities, rather than a taking of LEC property. They argue that in any event the Commission has authority to engage in a taking. They also contend that the Commission has properly explained its decision and that petitioners fail to raise any new issues not already fully debated in the record. The opposing parties further allege that the petitioners exaggerate their claims of injury and will not be irreparably injured absent a stay. The opposing parties also contend that a stay would substantially harm interconnectors as well as the public interest.

2. Discussion

6. *Legal Standard.* In ruling on stay petitions, the Commission uses the four-factor test established in *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Under that test, petitioners must demonstrate that (1) they are likely to succeed on the merits on appeal;[10] (2) they would suffer irreparable injury absent a stay; (3) a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest. We deny the petitions insofar as they seek stay of the physical collocation requirement because petitioners fail to satisfy these criteria.

7. *Likelihood of Success on the Merits.* Our decision to require physical collocation is a lawful exercise of Commission authority under the Communications Act to regulate interstate common carrier service in the public interest and to require physical connections between carriers.[11] As discussed in the *Expanded Interconnection Order*, physical collocation does not constitute a taking of private property, *per se* or otherwise, and would not violate the Fifth Amendment even if it were deemed a taking because the LECs will receive just compensation.[12] The LEC stay requests contain nothing that would cause us to change our conclusions in this regard.[13] In addition, we have sufficiently explained our departure from prior decisions in which we declined to order physical collocation.[14]

8. *Irreparable Injury.* Most significantly, petitioners fail to demonstrate that they will suffer irreparable injury absent a stay. The primary injury that petitioners allege is the cost of surveying all of their central offices for space availability and developing cost-supported tariffs for each of those offices. In a separate Order adopted today, however, we are modifying our requirement for the initial tariffing of expanded interconnection to include only those central offices likely to be used by interconnectors in the near future.[15] In addition, LECs will be able to recoup the costs of providing physical collocation through the rates for these services. Finally, the LECs will be able to pursue a Tucker Act claim if they believe that the tariffed charges for expanded interconnection are insufficient.[16] Other al-

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[10] The Commission will consider granting a stay upon a showing that its action raises serious legal issues if the petitioners' showings on the other factors are particularly strong.

[11] *Expanded Interconnection Order* at ¶ ¶ 219-226.

[12] *Expanded Interconnection Order* at ¶ ¶ 227-240.

[13] We are not persuaded by the Joint LECs' claim that we lack express or implied authority to engage in a taking. As fully discussed in the *Order*, the Communications Act provides adequate implied authority to engage in a taking under the circumstances presented by expanded interconnection. *Expanded Interconnection Order* at ¶ 238. Furthermore, the cases cited by petitioners to support their contentions are clearly distinguishable. *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1358 n.7 (9th Cir. 1977), *rev'd in part on other grounds sub nom. Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (its holding that a local zoning agency lacked express or implied taking power under its statutory authority in no way means that this agency lacks authority); *FCC v. Florida Power Corporation*, 480 U.S. 245 (1987) (its holding that the Pole Attachments Act does not provide the Commission express or implied authority to take property, does not mean that the Communications Act does not supply requisite authority in this context); *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394 (1992) (Interstate Commerce Commission's condemnation of public property pursuant to express statutory authority does not mean that express authority is required for this agency to take property; even the Joint LECs acknowledge that only implied authority is necessary).

[14] This is the first case in which the Commission has considered the interconnection of competitive transmission facilities with those of the LECs. In order for a competitor to provide facilities between the LEC central office and other locations, the interconnector facilities must terminate at the LEC office. *Expanded Interconnection Order* at ¶ 39 n.93 and ¶ ¶ 90-94. By contrast, in *Computer III*, the Commission found and repeatedly reaffirmed that physical collocation of enhanced services equipment was not necessary to achieve technical comparability between enhanced service provider (ESP) and LEC services and that voluntary use by Bell Operating Companies of price parity rules fully addressed the competitive needs of ESPs. *See, e.g., Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Safeguards*, 6 FCC Rcd 7571, 7600-7601 (1991).

[15] *Memorandum Opinion and Order*, FCC 92-552 (released December 18, 1992). Even without our decision to narrow the initial tariff filing requirements, the cost of compliance would not warrant a stay since "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough [to justify such relief]." *Virginia Petroleum Jobbers*, 259 F.2d at 925.

[16] Petitioners' argument that based on *Hooe v. United States*, 218 U.S. 322 (1910), they will not have a Tucker Act right to compensation is without merit. In *Hooe*, the Court denied a landlord's Fifth Amendment claim for just compensation against the United States, finding that a government officer had rented property for an amount that exceeded Congressional appropriation, thus acting beyond express Congressional authority. *Id.* at 334-336. Here, by contrast, there is no express limitation on the Commission's authority. Thus, we believe that *Hooe* is distinguishable. We also reject petitioners' argument that monetary compensation is an inadequate remedy for injury

leged injuries, such as interference with LEC business operations and potential injury to LEC facilities, are far too speculative to warrant a stay. We note, for example, that New York Telephone has voluntarily chosen to offer physical rather than virtual collocation and has not experienced the types of problems petitioners hypothesize. Under the *Virginia Petroleum Jobbers/Holiday Tours* standard, "the injury must be certain and great; it must be actual and not theoretical. . . . the party seeking relief must show that '[t]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm.'"[17] In this instance, petitioners have failed to meet this standard.

9. *Harm to Other Parties and Public Interest Considerations.* Moreover, we believe that staying physical collocation (even while requiring virtual collocation) would harm interconnectors and the public, through a diminution in competition. The Commission established the physical collocation requirement based on the record in this proceeding in which nearly all interconnectors argued that physical collocation best ensures that interconnectors will receive interconnection on the same terms and conditions as the LECs interconnect their own circuits. As stated in the *Expanded Interconnection Order*, we are committed to ensuring fair opportunities for all market participants, including interconnectors, to compete in providing access services.[18] For this reason, we decided that interconnectors should have the right to obtain physical collocation from LECs, and required the LECs subject to that Order to make physical collocation available to all interconnectors that request it. We conclude that staying physical collocation would thwart this important public policy objective and is not justified by petitioners.

B. Virtual Collocation

10. In a separate stay petition, SW Bell asks the Commission to stay virtual collocation entirely. SW Bell argues that it will prevail on the merits on appeal. It contends that virtual collocation constitutes a taking of LEC property, which is beyond the Commission's authority. The company contends that it will suffer "substantial" harm[19] as a result of expanded interconnection because it will lose customers to competitors, have less control of central office space, and incur costs for the initial tariffing and training of LEC personnel. Finally, SW Bell claims that staying the virtual collocation requirement would not harm other parties, and argues that the public interest requires a stay of virtual collocation to avoid imposing unnecessary costs on the LECs. No parties filed separate oppositions to the SW Bell petition, although many of the arguments raised in opposition to the Joint LEC and Ameritech petitions would apply to the SW Bell filing as well. In their petition, the Joint LECs also request stay of the virtual collocation requirement, but would provide virtual collocation in response to bona fide requests.[20]

11. Based on the legal standard set forth above, we deny both the SW Bell and Joint LEC petitions. We find the arguments in favor of staying both virtual and physical collocation even less persuasive than those for staying only physical collocation. The designation by interconnectors of equipment dedicated to their use and the monitoring of their interconnected circuits does not raise Fifth Amendment issues. We recognize that SW Bell may incur some costs, lose individual customers, and have to use central office space for the provision of virtual collocation service under the more competitive special access environment fostered by expanded interconnection, but these do not constitute irreparable injury, for the same reasons that we found that providing physical collocation does not constitute irreparable injury. *See supra* ¶ 8. Furthermore, staying virtual collocation also would deprive interconnectors of expanded interconnection entirely, and prevent achievement of the public interest benefits we have concluded will flow from a more competitive special access market.

IV. FRESH LOOK STAY PETITION

12. Bell Atlantic requests stay of the "fresh look" provisions of the *Expanded Interconnection Order*. In the *Order*, we determined that certain long-term LEC access arrangements raise potential concerns because they tend to lock up the access market, preventing customers from obtaining the benefits of the new, more competitive interstate access environment. In order to permit customers with long-term LEC access arrangements to take a "fresh look" at competitive access offerings, we limited the penalties LEC tariffs impose for early termination of LEC long-term arrangements.[21]

13. In support of its petition, Bell Atlantic contends that the "fresh look" requirement will be overturned on reconsideration or appeal because we did not give appropriate notice and opportunity for comment as required by the Administrative Procedure Act (APA).[22] Bell Atlantic alleges that the rule constitutes an unlawful prescription of rates in violation of the Communications Act.[23] Bell Atlantic also claims that it will be irreparably injured absent a stay because it could lose approximately $3.5 million in termination charges before resolution of the issue on reconsideration or appeal. Bell Atlantic argues that a stay would not substantially harm its customers or the public interest, because customers will be able to cancel their long-term arrangements with Bell Atlantic if they pay the tariffed termination charge. SW Bell filed comments supporting Bell Atlantic's petition arguing that it would suffer the same type of irreparable harm as Bell Atlantic.

14. The parties opposing the petition[24] submit that Bell Atlantic will not prevail on the merits because the "fresh look" provision is a logical outgrowth of the Notice of

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to real property interests. The Fifth Amendment itself allows for payment of just compensation for the taking of real property.

[17] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) quoting *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 307 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976).

[18] *Expanded Interconnection Order* at ¶ 39.

[19] Citing *Diginet, Inc., v. Western Union ATS, Inc.*, 958 F.2d 1388, 1393 (7th Cir. 1992), SW Bell claims that a petitioner may show substantial, rather than irreparable, harm where it has a stronger case on the merits. We are not persuaded by this argument. Assuming that this is the correct test, SW Bell does not have a strong case on the merits nor has it shown substantial harm. It therefore cannot benefit from the *Diginet* rule.

[20] The Joint LEC Petition does not separately address the grounds for staying virtual collocation.

[21] *Expanded Interconnection Order* at ¶ 201.

[22] 5 U.S.C. § 553.

[23] 47 U.S.C. § 205.

[24] *See supra* note 3.

Proposed Rulemaking[25] in this proceeding, and therefore does not violate the APA. The parties opposing a stay also assert that Bell Atlantic's allegations of customer losses are "exaggerated speculation," adding that customers would be harmed substantially if a stay were granted because they would be effectively deprived of an opportunity to take advantage of new competitive offerings. They also assert that a stay would be contrary to the public interest because it would allow Bell Atlantic and other LECs to maintain their hold on customers.

15. We deny Bell Atlantic's stay petition because it fails to satisfy the four-part *Virginia Petroleum Jobbers/Holiday Tours* test. First, Bell Atlantic is unlikely to prevail on the merits. More importantly, Bell Atlantic's claim of irreparable injury is too speculative to warrant a stay, particularly in light of our decision to accord the LECs additional pricing flexibility in conjunction with expanded interconnection.[26] Finally, we note that a stay would harm LEC special access customers by impairing their ability to take advantage of competitive alternatives, thereby delaying achievement of the public interest benefits of increased competition for special access resulting from expanded interconnection.

V. CONCLUSION

16. For the reasons discussed above, we deny the Joint LEC, Ameritech, SW Bell and Bell Atlantic stay petitions.

VI. ORDERING CLAUSE

17. Accordingly, IT IS ORDERED that the "Joint Petition for Stay Pending Judicial Review, Or, In the Alternative, for Stay Pending Agency Reconsideration;" the "Petition of the Ameritech Operating Companies for Stay Pending Reconsideration or Appeal;" the "Southwestern Bell Telephone Company's Petition for Stay;" and the Bell Atlantic "Petition for Stay Pending Reconsideration or Appeal" are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[25] *Expanded Interconnection with Local Telephone Company Facilities*, 6 FCC Rcd 3259 (1991).

[26] In addition, we note that, under our fresh look policy, the LECs will be fully compensated pursuant to the tariffed rates applicable to the term of service actually taken by the customer. *See Expanded Interconnection Order* at ¶ 202.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-141

In the Matter of

Expanded Interconnection with
Local Telephone Company Facilities

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 1992; Released: December 18, 1992

By the Commission: Chairman Sikes concurring in the result.

I. INTRODUCTION

1. In the *Expanded Interconnection Order*, we required all Tier 1 local exchange carriers (LECs), except for the Puerto Rico Telephone Company (PRTC), to file tariffs by February 16, 1993, offering expanded interconnection for DS1 and DS3 special access services.[1] Although LECs and interconnectors remain free to negotiate voluntary virtual collocation arrangements, we required these Tier 1 LECs to make physical collocation available to all interconnectors requesting it, envisioning only two circumstances warranting exemption.[2] In this Order, we do not modify any of the above requirements. We do, however, amend on our own motion,[3] certain of our other requirements to facilitate the initial implementation of expanded interconnection.

2. Specifically, we modify the requirement that the LEC expanded interconnection tariffs encompass all end offices, serving wire centers, and other points relevant for calculating special access rates. We instead require the LECs to file initial tariffs for only a subset of their central offices, as described more fully below, and establish new procedures for the tariffing of additional central offices thereafter. This change will permit us to target use of our administrative resources in the initial implementation of expanded "interconnection to achieve more fully our procompetitive goals in the near term, as well as to reduce the burden on all interested parties, including interconnectors, of the initial implementation process.

II. POSITIONS OF THE PARTIES

3. Several LECs have petitioned for stay of certain requirements of the *Expanded Interconnection Order*.[4] Among other things, they argue that the requirement that expanded interconnection be tariffed at all end offices, serving wire centers, and other rating points (hereinafter collectively referred to as "central offices") is extremely burdensome, especially since any petitions for exemption must be filed at the same time that initial tariffs are filed. The Joint LEC Petitioners assert that these requirements would force them, in a period of weeks, to survey each of their more than 10,000 central offices to determine space availability and technical feasibility for physical collocation, and conduct site-specific assessments to develop cost data in order to establish tariff prices, and where appropriate, prepare exemption petitions.[5] The LECs also argue that expanded interconnection will be requested only in a small subset of their central offices.[6]

4. Competitive access providers (CAPs) and interexchange carriers (IXCs) uniformly oppose the stay requests, arguing in part that the LEC assertions of injury are exaggerated.[7] Nevertheless, prospective interconnectors support the suggestion that expanded interconnection need not be initially tariffed in all LEC central offices so long as procedures areestablished to ensure that additional central offices can be expeditiously tariffed thereafter. They propose a number of methods for limiting the number of central offices for which initial tariffs would be filed. MFS and other CAPs propose that a list of offices could be developed -- either by interconnectors based on their collocation plans, or by the LECs (subject to interconnector supplementation) based on LEC projections of demand for interconnection.[8] Teleport proposes that expanded interconnection be tariffed initially only in those central offices accounting for at least 1.5% of the total business lines in each LATA and at least 1.5% of the total switched access minutes of use in each LATA.[9] Teleport estimates that this

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[1] *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, FCC 92-440 (released Oct. 19, 1992) (*Expanded Interconnection Order*) at ¶¶ 103, 259.

[2] *Id.* at ¶¶ 39, 41.

[3] 47 C.F.R. § 1.108.

[4] In a separate companion order, we have denied the LECs' stay petitions. Appendix A includes a list of the stay petitions and the oppositions thereto, as well as a list of the abbreviations used to refer to the parties.

[5] Joint LEC Petition at 18; McCausland Declaration ¶ 5; Shelton Affidavit at 2-5; Hayes Affidavit at 2. GTE estimates that these tasks will cost GTE more than $2 million. Jones Affidavit at ¶ 5. Bell Atlantic estimates that its efforts will require approximately 21,000 hours at a cost of $2 million and an additional $700,000 in outside appraiser fees, and that it will take 35 hours per office to estimate these costs in the offices where collocators would be likely to insist on physical collocation contrary to Bell Atlantic's preferences. McCausland Declaration at ¶¶ 6, 8. The LECs also assert that they will have to make physical alterations in central offices to establish necessary security arrangements and to accommodate racks, superstructure, and riser slots needed to carry cable and meet other technical demands. Joint LEC Petition at 19; McCausland Declaration at ¶ 8(a); Shelton Affidavit at 4-5; Hayes Affidavit at 3-4; King Affidavit at ¶ ¶ 3-7.

[6] Joint LEC Petition at 25-26; Jones Affidavit at ¶ 5 (GTE projects receiving requests at only 200 of its 4,400 offices); King Affidavit at ¶¶ 9-11 (SW Bell projects requests at 170 of its 1,300 offices); McCausland Declaration at 4-5 (Bell Atlantic projects requests at 120 of its 1,320 offices); Shelton Affidavit at 2 (Of its 700 offices, Pacific projects collocation at 10-20 offices in the short term and 50-75 offices in the long term). *See also* Hayes Affidavit at 3.

[7] *See, e.g.*, ALTS Opposition at 11-15; Teleport Denver Opposition at 5-6.

[8] MFS Opposition at 6 n.11, 12 n.21, 40. *Accord* Teleport Opposition I at 9; ELI Opposition at 3; ALTS Opposition at 12 n.23.

[9] Teleport Opposition I at 7. To avoid identifying an excessive number of initial offices in less populous LATAs, Teleport recommends that only offices with more than 20,000 business lines be included in the initial tariffing requirement. *Id.*

approach should yield 300-500 central offices nationwide for initial tariffing, constituting 85-95% of the central offices desired for expanded interconnection.[10]

5. ELI, another CAP, proposes that following the initial tariffing of a subset of offices, the LECs should be required to file tariffs no later than 45 days after a bona fide request for a specific office.[11] Teleport Denver recommends that the LECs offer initial collocation tariffs for only the top 20% of the central offices in each LATA, measured by DS1 and DS3 lines served.[12] MCI proposes that the LECs be required to tariff, by February 1993, physical or virtual collocation only at the approximately 430 central offices listed in Attachment 1 to its opposition, and that, thereafter, the LECs would be required to tariff any request for collocation within thirty days of the request.[13]

6. Responding to these subset suggestions, the Joint LEC Petitioners on December 8, 1992, filed a proposal under which the Tier 1 LECs would file a list of central offices in which they proposed to offer expanded interconnection for DS1 and DS3 services ten business days after their petition for stay was granted. Interconnectors would then be able to request additions to the list, which would be included in the tariff in time to be available in May 1993, the proposed effective date for the expanded interconnection tariffs. The Joint LEC Petitioners would impose an application fee for each central office an interconnector requested be added to the LEC list. Shortly after this pleading was filed, the Tier 1 LECs subject to the interconnection requirements, with one exception, submitted lists of central offices they each propose to include in its February tariff filing as central offices where expanded interconnection for DS1 and DS3 service would be available.[14] A number of the LECs have added central offices to their initial lists after receiving reactions from interconnectors.[15]

III. DISCUSSION

7. The information filed in response to the stay requests leads us to conclude that the requirement that each Tier 1 LEC, other than PRTC, file tariffs by February 16, 1993, making expanded interconnection available in *all* of their central offices for DS1 and DS3 interstate special access service should be modified. Accordingly, we herein revise the filing requirement to apply initially only to a subset of the LEC central offices.

8. All parties involved in expanded interconnection should benefit from the smoother implementation process made possible through a subset approach. Moreover, Commission resources would be targeted to ensure effective implementation of expanded interconnection in those central offices of interest to interconnectors. This approach should reduce LEC costs involved in surveying central offices for adequacy of space and preparation of tariffs and exemption requests. Interconnectors should benefit because they would no longer have to examine and respond to the LECs' proposed tariffs and space exemption requests for central offices in which they are not interested in the near term. They will instead be able to challenge potentially unreasonable LEC rate proposals and space exemption requests in additional central offices as the need arises. Interconnectors have either supported, or not opposed, a subset approach based on lists of central offices prepared by the LECs and supplemented by interconnectors. Accordingly, we conclude that it is unnecessary to require the LECs to file tariffs offering expanded interconnection for DS1 and DS3 service at all central offices immediately to achieve the goals underlying the decision to order expanded interconnection for special access service. We find that the requirements outlined below will better achieve our goals, while minimizing the costs of implementing expanded interconnection for DS1 and DS3 special access service.

9. Any subset for initial tariffing must include those central offices in which interconnectors are likely to desire expanded interconnection for DS1 and DS3 service in the near future, such as the first year that expanded interconnection is available. Based on the record before us, we conclude that the initial subset of central offices to be tariffed in February 1993 should, with the exception of SW Bell, be based on the specific lists developed by each LEC of the central offices in which expanded interconnection is likely to be requested, as supplemented with additional central offices requested by interconnectors in the next few weeks. For SW Bell, which has not submitted a list, we here define a subset of central offices, which we also will permit interconnectors to supplement.

10. The subject Tier 1 LECs, other than SW Bell, have already filed lists of offices that they propose should be included in their February 1993 tariff filings as the central offices in which they will offer expanded interconnection for DS1 and DS3 services.[16] Some LECs state that their lists were derived from information and requests received from potential interconnectors along with their own assessment of potential demand for high-capacity special access services. Others developed their initial lists from internal assessments, but remain willing to add central offices at the request of interconnectors. After receiving reactions from potential interconnectors, a number of LECs have filed updated lists adding central offices. In total, the lists would have these Tier 1 LECs tariffing more than 1000 central offices in their initial expanded interconnection tariff fil-

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[10] Teleport Opposition 1 at 7, 8 n.19. In the alternative, Teleport proposes requiring implementation of expanded interconnection in central offices having some level of DS1 and DS3 demand. Teleport Opposition 1 at 8. Teleport prefers use of switched traffic, rather than special access demand, to gauge which offices should be covered, and argues that interconnectors are likely to seek to serve offices in which the largest numbers of business customers are located, which may not be related to LEC network architecture decisions regarding special access. *Id.* at 8 n.20.

[11] ELI Opposition at 3.

[12] Teleport Denver Opposition at 4-5.

[13] MCI Opposition 1 at 11.

[14] The breakdown of the central offices included in the initial lists filed individually by the LECs is as follows: Ameritech, 136 central offices; Bell Atlantic, 92 central offices; BellSouth, 60 central offices; NYNEX, 49 central offices; Pacific, 39 central offices; US West, 84 central offices; GTE, 79 central offices; United, 52 central offices; SNET, 8 central offices; Centel, 46 central office switches; Rochester, 1 central office; Cincinnati Bell, 2 central offices; and Lincoln, 1 central office.

[15] In these subsequent *ex parte* filings, eight of the LECs' lists were increased to the following totals: Ameritech, 242 central offices; Bell Atlantic, 167 central offices; BellSouth, 129 central offices; NYNEX, 180 central offices; Pacific, 52 central offices; US West, 113 central offices; United, 54 central offices; and Cincinnati Bell, 6 central offices.

[16] Those requesting stay of various aspects of our collocation requirements condition their lists on the Commission's grant of a stay.

ings.[17] We here require the subject LECs to tariff expanded interconnection in those central offices in their initial tariff filings of February 16, 1993.

11. SW Bell has not filed a list of central offices for which it would offer DS1 and DS3 expanded interconnection in its initial tariff filings. Therefore, we direct SW Bell to file a list with the Commission by December 28 identifying the 250 largest central offices in its service territory.[18] This number of offices roughly correlates with the largest number of central offices included in the lists filed by the other Tier 1 LECs of comparable size.[19] We have selected the largest number since the resulting list, unlike the others, will not reflect any specific input from interconnectors. As a result, we should be more, rather than less, inclusive in fashioning our initial requirement. We believe that this list, by including the offices with the greatest number of high-capacity circuits, should include most of the central offices of interest to interconnectors.

12. These lists of offices should ensure that LECs offer expanded interconnection at most of the central offices in which interconnection will be requested. We expect, however, that these lists will not include all the central offices in which interconnectors will desire to obtain expanded interconnection for DS1 and DS3 service in the near term. Therefore, a procedure to allow interconnectors to add offices to the list before February 16, 1993, is essential. Given our requirement that a LEC request an exemption based on lack of space at the time its tariff for that office is filed, we conclude that it would be better if a date certain for interconnectors to request the addition of central offices to the LEC lists were established, rather than leaving the time open for interconnectors to request additional central offices to be included in the LECs' February tariff filing.

13. Therefore, we require interconnectors who desire that additional central offices be included in a LEC's February 16, 1993, tariff filing to submit such requests to that LEC no later than January 15, 1993.[20] Interconnectors should only request those additional offices where they intend to seek interconnection within the twelve months following the effectiveness of the expanded interconnection tariffs. We anticipate that only a limited number of interconnector requests will be received by the LECs.

14. Finally, we will not permit the LECs to assess a nonrecurring charge upon interconnectors submitting a bona fide request to cover the costs of surveying the central office for space availability. Such a procedure would impose a burden on the interconnectors that is not consonant with the rights they were given in the order.[21]

15. We conclude that these procedures should reasonably ensure that the initial expanded interconnection tariffs will include the LEC central offices necessary to ensure that our procompetitive goals in this proceeding are achieved. In addition, these procedures improve on our previous decision by more narrowly targeting requirements to apply to only those end offices of interest to interconnectors.

16. We also conclude that, for the longer term, the LECs must include in their expanded interconnection tariffs provisions establishing a procedure to add central offices upon receiving a bona fide request from an interconnector after the initial expanded interconnection tariffs become effective. As with services other than DS1 and DS3,[22] the tariffs must provide that tariff revisions adding central offices in which expanded interconnection is offered will be filed within 45 days of receipt of a bona fide request, to be effective upon 45 days notice.

17. We also modify the requirements for the filing of petitions for exemptions from the physical collocation requirement with respect to specific central offices based on space availability.[23] The LECs will be required to request space exemptions from physical collocation in any central office included in its February 16, 1993, tariff filing at the time those tariffs are filed. With respect to other offices, LECs must file petitions for exemption based on insufficient space at the same time that they file tariff revisions offering expanded interconnection at those central offices.[24]

18. We conclude that the procedures outlined above will establish a better framework, more consistent with our public interest goals, than that set forth in the *Expanded Interconnection Order*, and will continue to further the procompetitive goals of this proceeding through implementation of expanded interconnection.

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, that pursuant to authority contained in Sections 1, 4(i), 201-205 and 214(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, and 214(d), and pursuant to Section 1.108 of the Commission's rules, 47 C.F.R. § 1.108, the

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[17] *See supra* notes 14 & 15.

[18] It shall base its determination on the number of equivalent DS1 circuits in a given central office. For this purpose, a DS3 circuit shall be deemed to have 28 DS1 circuits. SW Bell also should serve copies of its list on all parties on the service list in this proceeding by overnight delivery. These lists must be provided promptly in order to permit interconnectors to request any additions prior to the January 15, 1993, deadline established below. Accordingly, we find good cause to make this requirement effective less than 30 days after Federal Register publication.

[19] SW Bell has approximately 1300 central offices, Joint LEC Petition, King Affidavit at 2, while Ameritech has approximately 1200 central offices, Ameritech Petition at 6.

[20] Any interconnector requests for additional central offices received by the LECs after January 15, 1993, should be processed in accordance with the procedures described below. Because the central offices in which expanded interconnection for DS1 and DS3 service is to be tariffed in February 1993 must be identified promptly to permit the smooth implementation of expanded interconnection, we find that the procedures we set forth for establishing the list of central offices to be included in those tariffs must become effective immediately. Accordingly, we find good cause exists to make these procedures effective less than 30 days after Federal Register publication.

[21] We also permit interconnectors to request the addition of central offices between January 16, 1993, and the date the initial tariffs become effective. The LECs shall file any tariff revisions necessary to respond to these requests 45 days after receipt of the request, effective on 45 days notice. Any interconnector requests received by the LECs after January 15, 1993, but before February 17, 1993, shall be deemed to have been made on February 16, 1993. This procedure will simplify our administrative process and ensure that expanded interconnection for any central offices for which interconnectors make a bona fide request during this period will not become effective before expanded interconnection is available in the offices included in the February 16, 1993, tariff filing.

[22] *Expanded Interconnection Order* at ¶ 259 n.603.

[23] *Id.* at ¶ 260.

[24] We do not modify the requirements applicable to the exemption based on state governmental action.

Commission reconsiders its decision in *Expanded Interconnection Order* on its own motion to the extent specified herein.

20. IT IS FURTHER ORDERED that SW Bell, by December 28, 1992, shall file a list of 250 central offices as described above with the Commission and serve all parties to this proceeding by overnight delivery.

21. IT IS FURTHER ORDERED that the policies and requirements adopted herein SHALL BE EFFECTIVE on February 16, 1993, except for the requirements that SW Bell file a list of central offices by December 28, 1992 and that interconnectors be permitted to request additional offices on or before January 15, 1993, which shall be effective upon the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LEC Stay Petitions

Joint Petition for Stay Pending Judicial Review or, in the Alternative, for Stay Pending Agency Reconsideration, filed by the Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Corp. and BellSouth Telecommunications, Inc. (BellSouth), Cincinnati Bell Telephone Co. (Cincinnati Bell), GTE Service Co. and its Affiliate Domestic Telephone Operating Companies (GTE), Lincoln Telephone Co. (Lincoln), Pacific Bell and Nevada Bell (Pacific), Southern New England Telephone Co. (SNET), Southwestern Bell Telephone Co. (SW Bell) and United Telephone Companies (United) (collectively, Joint LECs) (Nov. 10, 1992) (Joint LEC Petition)

Petition of the Ameritech Operating Companies (Ameritech) for Stay Pending Reconsideration or Appeal (Nov. 13, 1992) (Ameritech Petition)

Petition for Stay Pending Reconsideration or Appeal, filed by Bell Atlantic (Nov. 10, 1992) (Bell Atlantic Petition)

Southwestern Bell Telephone Company's Petition for Stay (Nov. 18, 1992) (SW Bell Petition).

Comments and Oppositions

Association for Local Telecommunications Services Opposition to Petitions for Stay Filed by Certain Tier 1 Local Exchange Companies, Ameritech, and Bell Atlantic (Nov. 20, 1992) (ALTS Opposition)

Opposition of Cox Teleport, Inc. (to Joint LEC, Ameritech and Bell Atlantic Petitions) (Nov. 20, 1992) (Cox Teleport Opposition)

Oppositions to Stay filed by Electric Lightwave, Inc. (to Joint LEC, Ameritech, and Bell Atlantic Petitions) (Nov. 20, 1992) (ELI Opposition)

Opposition of Intermedia Communications of Florida, Inc. Opposition to Petitions for Stay (of Joint LECs, Ameritech and Bell Atlantic) (Nov. 20, 1992) (Intermedia Opposition)

MCI Partial Opposition to Joint Petition for Stay Pending Judicial Review Or, In The Alternative, For Stay Pending Agency Reconsideration And To Ameritech Petition For Stay Pending Reconsideration Or Appeal (Nov. 20, 1992) (MCI Opposition I)

MCI Opposition to Bell Atlantic Petition (Nov. 20, 1992) (MCI Opposition II)

Consolidated Opposition To Petitions For Stay (to Joint LEC, Ameritech and Bell Atlantic Petitions) filed by MFS Communications Company, Inc. (Nov. 20, 1992) (MFS Opposition)

Southwestern Bell Telephone Company's Comments on Bell Atlantic's Petition For Stay (Nov. 20, 1992) (SW Bell Opposition)

Opposition to Petitions for Stay (of Joint LECs and Ameritech) filed by Teleport Communications Group (Nov. 20, 1992) (Teleport Opposition I)

Opposition to Petition for Stay Pending Reconsideration or Appeal (to Bell Atlantic Petition) filed by Teleport Communications Group (to Bell Atlantic Petition) (Nov. 20, 1992) (Teleport Opposition II)

Opposition to Petitions For Stay (of Joint LECs and Bell Atlantic) filed by Teleport Denver Ltd. (Nov. 20, 1992) (Teleport Denver Opposition)

Opposition to Petition to Stay (of Ameritech) filed by Teleport Denver Ltd. (Nov. 20, 1992) (Teleport Denver Opposition)

NOTE: Every party opposed all three stay requests, except for Southwestern Bell (the only LEC to file an opposition), which only "commented" on Bell Atlantic's request to stay the fresh look provisions.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

LAWTON CHILES, BOB MARTINEZ,
and BILL NELSON

Against Station WTVT(TV),
Tampa, Florida

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 1992; Released: November 30, 1992

By the Commission: Commissioner Quello concurring in part, dissenting in part, and issuing a statement.

1. The Commission has before it an Application for Review filed on October 14, 1992, on behalf of WTVT License, Inc., licensee of television station WTVT(TV), Tampa, Florida ("WTVT"). WTVT requests that the Commission modify an October 2, 1992, *Order* [1] by the Chief of the Mass Media Bureau establishing the scope, timetable, and procedures for discovery with respect to the issue of whether WTVT overcharged candidates Lawton Chiles, Bob Martinez, and Bill Nelson ("Complainants") during the 1990 primary and general elections, in violation of Section 315(b) of the Communications Act of 1934, as amended.[2] An opposition to WTVT's Application for Review was filed on "behalf of Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith[3] on October 29, 1992, and a reply to Complainants' opposition was filed on behalf of WTVT on November 5, 1992.[4]

2. Also before the Commission is an Application for Review filed on behalf of Complainants on November 2, 1992, requesting review of the Bureau's October 2, 1992, *Order* and of a subsequent Bureau decision modifying the *Order*.[5] An opposition to Complainants' Application for Review was filed on behalf of WTVT on November 13, 1992, and a reply to WTVT's opposition was filed on behalf of Complainants on November 24, 1992.

3. Pursuant to the guidelines set forth in the *Declaratory Ruling* in *Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended*,[6] and in light of the information before us, we affirm the Bureau's determination that Lawton Chiles, Bob Martinez, and Bill Nelson have established a *prima facie* case of a violation by station WTVT of the lowest unit charge ("LUC") requirement of Section 315(b)(1) of the Communications Act. Moreover, we affirm the Bureau's finding that Comp nants failed to establish a *prima facie* case with respect the allegations that WTVT failed to disclose to candida... all discount rates and privileges and that WTVT impermissibly increased the rates it charged candidates.[7] However, we grant in part WTVT's request that the scope of document production be limited so as to reflect the Bureau's finding of a *prima facie* case on the single issue of overcharges during the LUC periods.

I. WTVT's Application for Review

A. The Pleadings.

4. In its Application for Review, WTVT requests that eleven categories of documents that the Bureau has ordered to be produced be stricken or narrowed.[8] WTVT asserts that the Bureau permitted discovery substantially broader than was contemplated by the *Declaratory Ruling*, or than is allowed under applicable judicial practice. WTVT argues that discovery be limited to those areas which are likely to lead to relevant admissible evidence on the single issue which the Bureau has permitted to go forward -- that is, overcharges during the LUC period. Because this is the first complaint to be processed under the *Declaratory Ruling*, WTVT supports full Commission supervision of the procedures established by the Bureau, as these procedures will invariably govern resolution of pending and future complaints.

5. WTVT also asserts that it is inappropriate to permit Complainants to establish a *prima facie* case exclusively upon Spot Quotations and Data, Inc. ("SQAD") or similar data.[9] In support of this assertion, WTVT argues that SQAD analyses omit any consideration of classes of time and that reliance on SQAD results automatically in the establishment of a *prima facie* case against any top-rated station in a market, and effectively forecloses the establishment of a *prima facie* case against a low-rated station. WTVT points as an example to a pending candidate complaint against sta-

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[1] 7 FCC Rcd 6661 (1992).

[2] 47 U.S.C. Section 315(b). *See also*, 47 C.F.R. Section 73.1942(a).

[3] As indicated in the Bureau's *Order*, the complaint of Jim Smith was dismissed. *Order* at para. 29. Complainants do not specifically challenge this dismissal in their opposition or in their subsequently filed Application for Review. Therefore, we do not construe the Complainants' Application for Review to encompass an appeal of the Bureau's dismissal of Mr. Smith's complaint.

[4] WTVT also filed a motion for stay of the *Order* on October 19, 1992, and Complainants filed an opposition to this motion on October 29, 1992. However, because the Bureau, on its own motion, modified its *Order* to extend the dates for commencement and completion of discovery, WTVT's motion for stay, and Complainants' opposition thereto, are moot.

[5] *Modification of Order*, DA 92-1492 (released October 28, 1992).

[6] 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) ("*Declaratory Ruling* ").

[7] We note that Complainants do not challenge the Bureau's dismissal of the allegations that WTVT overcharged candidates during the comparable use period and discriminated between candidates.

[8] WTVT's detailed allegations with respect to each of these challenged categories are set forth in Section I.B., *infra*.

[9] "SQAD" is the acronym for Spot Quotations and Data, Inc., a computerized data publishing service. Through this service, advertising subscribers receive monthly reports that provide cost-per-point information for 30-second spots in specific dayparts for the markets selected by the subscriber.

tion WCPO(TV), Cincinnati, Ohio. WTVT notes that, while the Commission in its 1990 political audit found that WCPO(TV) did not violate the LUC requirements, the candidate in the pending complaint relies on SQAD data in an effort to establish a *prima facie* case of overcharges.

6. Complainants in their opposition argue that WTVT's Application for Review should be denied because it raises concerns that have already been addressed, and rejected, by the Commission in the *Declaratory Ruling*. Complainants also allege that WTVT's Application for Review is defective in that it does not specify with particularity the factors which warrant consideration under Section 1.115(b)(2) of the Commission's rules.[10] Complainants assert that the scope of discovery is consistent with the *Declaratory Ruling*.[11] Finally, as to WTVT's argument regarding the use of SQAD, Complainants point out that the *Declaratory Ruling* authorizes the use of generally-available industry or statistical data such as SQAD to establish a *prima facie* case of an LUC violation. Complainants also assert that the SQAD analysis is station specific in that the average cost-per-point information for a given daypart for a market is multiplied by station-specific ratings information.

7. In reply, WTVT points out that its Application for Review is sufficiently specific to warrant Commission review, as evidenced by the fact that Complainants devote more than five pages to a point-by-point rebuttal of WTVT's allegations. WTVT asserts that it clearly established the factors warranting review under Section 1.115(b) of the Commission's Rules. WTVT argues that Complainants in their opposition fail to specifically demonstrate the relevance of the challenged categories of documents, and in several instances unwittingly demonstrate the validity of WTVT's position that the scope of discovery established by the Bureau is overly broad.

B. Discussion

8. We reject Complainants' argument that WTVT's Application for Review does not meet the standard set forth in rule 1.115(b). WTVT established with sufficient specificity its claim that the scope of discovery set forth in the Bureau's *Order* is overly broad and articulated clearly why this overbreadth warrants Commission review. We find that review of the Bureau's *Order* is warranted under Section 1.115(b)(2)(i) and (ii).[12]

9. Use of SQAD to establish *prima facie* case of overcharges. WTVT's primary concern with regard to the use of SQAD data is based on its assumption that SQAD is not station specific and thus can be used to establish automatically a *prima facie* case against any top-rated station in a market.[13] If, as WTVT suggests, using SQAD data provided only *average market* rates, we would agree that it would be insufficient to establish that a *specific* station exceeded the LUC. WTVT, however, fails to demonstrate that the information set forth in the complaint, compiled from SQAD and station rating sources, is not station specific. In contrast, Complainants in their opposition point out that the use of SQAD *is* station specific in that cost-per-point information for a given daypart is multiplied by station-specific ratings information. In their complaint, candidates submitted data that was compiled by multiplying the SQAD market cost-per-point factor by WTVT's own ratings points for specific time periods during which candidates bought time to establish the "SQAD" estimate of the cost of advertising *on WTVT* during those time periods. Thus, WTVT's argument against the use of SQAD is not persuasive.

10. WTVT also points to the pending complaint against WCPO(TV) in which the station was exonerated in the Commission's 1990 political audit. We note that the complaint against WCPO(TV) has not yet been analyzed, and thus neither the Bureau nor the Commission has determined whether the complainant has correctly used SQAD data to establish a *prima facie* case of overcharges. The Bureau must review the facts of each case to determine whether SQAD data establishes a *prima facie* case of overcharges.

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[10] 47 C.F.R. Section 1.115(b)(2).

[11] Complainants claim that "the standard for review by the Commission has not been met" in that any "discovery disputes" should have been handled through a request for reconsideration by the Bureau. As explained in paragraph 8, *infra*, we have determined that Commission review is warranted.

[12] Complainants' reliance on *Alegria I, Inc.*, 4 FCC Rcd 587 (1989), and *Dial-A-Page, Inc.*, 75 FCC 2d 432 (1980), is not persuasive. In *Alegria I, Inc.*, the Commission did not indicate the manner in which the Application for Review at issue failed to specify with particularity the questions warranting review, and thus no comparison can be made to WTVT's Application for Review. However, in *Dial-A-Page, Inc.*, the Commission indicated that the various claims in the Application for Review before it -- including that a Bureau grant of a construction permit was erroneous, and that it denied a competing applicant equal protection -- were not supported by any facts, evidence, arguments, reasoning, or case law. WTVT's Application for Review, unlike the Application for Review in *Dial-A-Page, Inc.*, contains ample arguments, reasoning, and case law in support of its position that the categories of documents required for production are overly broad.

[13] As to WTVT's argument that SQAD analyses do not take into account classes of time, we note that WTVT has not presented the Bureau with sufficient information regarding the manner, if any, in which SQAD data takes into account class of time. However, even if SQAD analyses do not take into account class of time, SQAD is a source of industry data on average rates, and as such is currently the best resource available for a candidate who does not have access to a station's commercial records to determine whether he or she has been overcharged. The Commission specifically endorsed the use of such data on average rates in the *Declaratory Ruling*, 6 FCC Rcd at 7521, n.47. Moreover, the Bureau correctly noted in its *Order* that:

> A *prima facie* case of a violation would otherwise be difficult, at best, to demonstrate in light of the fact that information regarding the rates a station charges a commercial advertiser need not be made available to candidates.

Moreover, we note that stations are afforded the opportunity, in their answer to a complaint, to rebut the use of SQAD data, particularly in cases in which candidates bought fixed rather than preemptible time, by submitting information to support a finding that the fixed rates charged to candidates were that station's LUC for fixed time. In this case, WTVT made no attempt to provide any specific information to the Commission that could in any way support a conclusion that the fixed rates charged to Complainants were WTVT's LUC for fixed time.

11. WTVT has not convinced us that the use of SQAD in this case to establish a *prima facie* case of LUC overcharges was incorrect. We therefore affirm the Bureau's finding in this regard.

12. **Scope of document production.** The *Declaratory Ruling* provided that, once a *prima facie* case has been established, "limited discovery" would be permitted. Consistent with this principle, we have reviewed WTVT's Application for Review and conclude that the Bureau's ruling should be modified to require more limited discovery than provided for in Appendix A to the Bureau's *Order*.[14] Specific discussion with respect to each of the categories of documents required to be produced and challenged by WTVT follows.

13. **Category 1: All advertising contracts executed by or on behalf of candidates for public office in connection with the 1990 primary and general elections. Category 2: All logs or other documents recording time, duration and class of advertising time for each political advertisement ordered and/or aired.** WTVT argues that these categories of documents are overbroad because: (1) rates for advertising sold to other candidates are irrelevant to a determination of the LUC; (2) the requested materials are relevant only to a possible issue of discrimination between candidates, and the Bureau has already dismissed the portion of the complaint alleging discrimination; (3) only documents describing advertising purchased by candidates Chiles, Martinez, and Nelson are relevant; and (4) advertising *contracts* for all candidates are irrelevant because they do not necessarily reflect the rate actually paid by a candidate,[15] and thus WTVT should be required to produce only invoices. Complainants in their opposition argue that the rates paid by other political advertisers are relevant to a determination of LUC. Complainants also assert that advertising contracts for candidates should be produced because WTVT's invoices do not designate the class of time, and contracts may designate the class, as well as other characteristics, of political and non-political spots.

14. We disagree with WTVT that categories 1 and 2 are overly broad. Information regarding the advertising time sold to candidates is highly relevant to a determination of the lowest unit charge, as a low candidate rate could establish the LUC for that class of time and time period.[16] Thus, information with respect to all candidates, in addition to Chiles, Martinez, and Nelson, is clearly relevant.

15. Moreover, we are modifying category 2 to clarify that WTVT is also required to produce orders and invoices recording time, duration, or class of advertising time. This is in addition to the requirement in the Bureau's *Order* that WTVT produce all logs and other documents recording time, duration, or class of advertising time. Orders, invoices, and contracts should all be produced, to ensure that all relevant information is obtained. For example, an invoice may indicate the number of spots purchased, when these spots actually aired, and the amount paid for each spot, but may not specify the class of spot purchased or when the spot was originally scheduled to run.[17] Information regarding class of time and when a spot was originally scheduled to run may be available only in the contract or order.

16. **Category 3(b): All long term contracts that pertain to commercial spots, including make goods and bonus spots, that aired during these periods.** WTVT argues again that only invoices, and not contracts, should be produced. For the reasons set forth above with respect to categories 1 and 2, we will require WTVT to produce the contracts specified in this category. In addition, category 3(a) of the Bureau's *Order* requires WTVT to produce, "All logs or other documents recording time, duration, or class of advertising time for each commercial spot aired." We modify category 3(a) to make clear that WTVT is required to produce invoices for each commercial spot aired.

17. **Category 3(c): All addenda and memoranda relating to these invoices or contracts.** WTVT argues that this category appears to include private notes of the sales staff, internal memoranda regarding selling strategies, and other highly privileged but irrelevant material. WTVT asserts that the only relevant addenda and memoranda are "those which serve to alter or otherwise explain the time, duration, class, costs or other relevant features contained in a document which otherwise is subject to production...," and urges the Commission to so limit this category. Complainants respond that any addenda or memoranda that are required to be produced under this category, "will in all likelihood relate to time, duration, class, costs or other relevant features, and should be provided." Complainants apparently agree with WTVT that the only relevant documents required under this category are those relating to time, duration, class, or cost. We therefore modify category 3(c) to require production of addenda or memoranda relating to these invoices or contracts that alter or otherwise address the terms or provisions of any document subject to production pursuant to this document production order.

18. **Categories 3(d) and 3(e): All orders for commercial spots aired during these periods, including confirmation orders or contracts; All orders for bonus spots, public service announcements, or any other type of free spots, for any of the commercial advertisers who purchased time that ran during these periods.** WTVT argues that, given its demand-based method of pricing, a mere order or contract would not necessarily reflect the rate charged an advertiser.

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[14] These limited modifications are set forth in revised Appendix A. In addition, minor editorial changes are set forth in revised Appendix B, and an updated timetable for discovery and post-discovery is set forth in Appendix C.

[15] WTVT argues that the irrelevance of contracts is particularly true with respect to WTVT, which utilizes a demand rate pricing system that causes daily fluctuations in the LUC.

[16] *See The Law of Political Broadcasting and Cablecasting: A Political Primer*, which provides that:

> Section 315(b)(1) states that a station's rates during the 45- or 60-day period shall "not exceed" its lowest unit charge to other purchasers. It does not state that a station may not charge candidates a lower rate than other purchasers. However, if one candidate or group of candidates is given a lower rate, this in itself becomes the "lowest unit rate" and other candidates may not be charged more than this.

100 FCC 2d 1476, 1517 (1984) ("*1984 Political Primer* ") (citing to *Letter to Robert A. Marmet, Esq.*, June 2, 1977).

[17] We note that information concerning class of time was not clear from the invoices submitted by WTVT in its March 2, 1992, answer to the candidates' complaint.

WTVT points out that such information would be contained only in the invoice. Complainants respond that all documents indicating class and other characteristics of each spot are relevant.

19. We reject WTVT's suggestion that it not be required to produce the information in categories 3(d) and (e). As noted above with respect to categories 1, 2, and 3(b), orders, contracts, *and* invoices are needed to provide a complete picture of the advertising time sold by WTVT.

20. **Category 3(f): All documents relating to or describing special discount packages sold to commercial advertisers that include spots that aired during these periods.** WTVT argues that, because the Bureau rejected the argument that WTVT failed to disclose to candidates all discount rates and privileges, the only relevant documents in this category are those that describe the rate and other terms of packages. Complainants respond that the information in this category has a direct bearing on characteristics of each spot, and is therefore clearly relevant.

21. We eliminate category 3(f) from the list of documents that WTVT is required to produce. Until December 1991, the Commission permitted broadcasters to treat "packages" as a separate class of time, which did not have to be included in a station's LUC calculations.[18] Rather, stations were required only to make these packages available to candidates and charge them proportionately.[19] Thus, during the 1990 primary and general elections, package plans were not relevant to a determination of the station's LUC.[20]

22. **Category 3(g): A statement indicating how many commercial positions each time period or program reflected in the invoices or contracts is formatted to contain.**[21] WTVT argues that this category is irrelevant because it addresses the availability of time for political advertising. WTVT points out that Complainants never alleged that they were denied an opportunity to purchase any specific lengths, classes, positions, or categories of time which they had sought. Complainants do not address this argument in their opposition. Because category 3(g) addresses the number of commercial spots available, a factor that is not directly relevant to the issue of overcharges, we eliminate this category from the list of documents to be produced.

23. **Category 3 (final sentence): In addition, the station should provide all rate cards and avails in use during these time periods for both political and commercial advertisers, as well as all written materials describing advertising packages or pricing policies.** WTVT asserts that the Bureau already examined WTVT's 1990 rate cards and rejected Complainants' allegations that the rate cards were inadequate or otherwise deprived them of an ability to purchase advertising time. Complainants respond that this information is clearly relevant to class distinctions, and to the characteristics of each spot.

24. To the extent set forth below, the documents in category 3 (final sentence) need not be produced. The Bureau has examined WTVT's rate cards and determined that Complainants failed to establish a *prima facie* case of a failure to make available to candidates all discount rates and privileges. Thus, further inquiry along these lines would be inconsistent with the findings in the *Order*.[22] Moreover, it is unnecessary to require production of rate cards because Complainants already have access to them.

25. With respect to "written materials describing advertising packages," these documents need not be produced for the reasons set forth in the discussion of category 3(f). As noted in that discussion, package plans were not relevant to a determination of the station's LUC during the 1990 primary and general elections. Finally, "written materials describing... pricing policies" is deleted from this category, as these materials are encompassed within those required to be produced in category 4, as modified below.

26. Complainants argue generally that the information in category 3 (final sentence) is relevant to the characteristics of each spot. While this may be the case, more than enough information pertaining to the characteristics of commercial and political spots will be available through categories 1, 2, 3(a) through (e), and 4.

27. **Category 4: All documents used by the station to explain to its sales personnel or other employees or agents dealing with political campaigns, or the agents of political campaigns, the application of the lowest unit charge provisions of Section 315(b) of the Communications Act. This should include any written policy statement(s) used by the station in 1990 which directly or indirectly related to the sale or provision of time to political candidates.** WTVT argues that there is no issue regarding the station's sales practices or a candidate's ability to obtain desired advertising time, and thus this category is irrelevant. Complainants respond that WTVT's pricing practices, and the conduct of the licensee that led to the pricing practices, are at the heart of the *Order*.

28. The pricing policies of the station, in particular the manner in which the employees or agents of the station applied the lowest unit charge requirement to candidates, are highly relevant to the issue of whether WTVT overcharged candidates. For this reason, category 4 will be retained. Moreover, we are modifying the last sentence of category 4 to ensure that any written materials describing the pricing policies of the station -- as applicable to *both* commercial and political candidates -- are produced. This category originally required only that written policy statements which relate to the sale of time to political candidates be produced. Clearly, pricing policies of the station with respect to commercial advertisers are relevant, as the lowest unit charge is calculated with reference to time sold to commercial and political advertisers. Thus, the last sentence in category 4 is modified to read: "This should

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[18] *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 694 (1991), *recon. denied*, 7 FCC Rcd 4611 (1992) ("*Political Programming Policies*").

[19] *1984 Political Primer*, 100 FCC 2d at 1515.

[20] For any candidate complaints relevant to time purchased after December 1991, however, package plan information would be relevant and subject to production if a *prima facie* case of an LUC violation were established.

[21] WTVT also points out that categories 3(h) and (i) are interrogatories and not documents, and thus should not be included in Appendix A but rather in Appendix B. This objection is noted, and these Appendices are modified accordingly.

[22] Complainants in their Application for Review challenge the Bureau's decision that no *prima facie* case was established regarding the availability of all discount rates and privileges. As will be explained in greater detail below, we uphold the Bureau's decision with respect to this issue.

include any written policy statement(s) used by the station in 1990 which directly or indirectly related to the station's pricing policies."

29. **Category 5: All documents reflecting the existence, implementation and results of any audit of rates charged to political advertisers performed by or on behalf of the station with respect to the 1990 primary and general elections, including any provision of rebates to such political advertisers, as well as all documents explaining or detailing the methodology used by the station in performing any such audit or providing any such rebates.** WTVT points out that the Commission in the *Declaratory Ruling* rejected the relevance of a station's voluntary efforts to settle overcharge claims. Thus, WTVT argues, its voluntary efforts to discover irregularities and to issue rebates must be deemed irrelevant to the complaint procedure. Complainants respond that WTVT's acknowledgement of overcharges more than a year after the overcharges occurred cannot be characterized as "efforts to settle."[23]

30. We note that broadcasters have long been required to provide rebates to political candidates who paid more for an advertising spot than a commercial advertiser whose spot, of the same length and class, clears during the same time period.[24] WTVT acknowledges in its answer to the complaint that its audits were routine and were conducted well before any complaint was filed. In this regard, to the extent that routine audits will most clearly reveal a station's methodology for determining whether a candidate has received the LUC, they provide the most likely source of evidence for candidates to support allegations of overcharges. Thus, we believe that the documents described in category 5 related to any audits conducted by WTVT that are not otherwise privileged should be produced.[25]

II. Complainants' Application for Review

A. The Pleadings

31. Complainants ask that the Commission determine that a *prima facie* case has been established that WTVT failed to disclose all discount rates and privileges to candidates. The Bureau in its *Order* found that Complainants did not establish a *prima facie* case on this issue. Complainants point out that the Bureau's decision was based on its determination that the cover sheet to WTVT's rate card disclosed the existence of preemptible rates.[26] Complainants allege that the Bureau incorrectly accepted WTVT's claim that this cover sheet had been provided as part of the station's rate card. Complainants argue that the Commission should have inferred from the complaint (in which Complainants provided the Commission with a copy of the rate card but no cover sheet) that a cover sheet was not provided. In its opposition, WTVT points out that Complainants represented in a previous pleading that they would demonstrate that the cover sheet was not provided in at least one case, but that Complainants failed to submit the promised proof.

32. Complainants next argue that the Bureau made an erroneous finding with respect to the issue of whether WTVT improperly increased its rates. While recognizing that a station may change its rates during the pre-election period due to ordinary business practices, Complainants assert that rates should change on a weekly basis at most, not on a daily basis as it alleges was the case with WTVT. Complainants point out that WTVT's standard contract provision locks in the rates for "upfront" advertisers for three months, and argue that similar benefits should be provided to candidates.

33. WTVT responds that Complainants misconstrue the relevant provision in WTVT's standard contract, which only guarantees existing rates for spots already under contract at the time of the increase. WTVT points out that Complainants have not alleged that any spots which they

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[23] Complainants also argue that WTVT mischaracterizes the *Order* by maintaining that the Bureau regarded rebates as irrelevant to Complainants' claim of having been overcharged. In fact, the Bureau did not determine that the issue of rebates was irrelevant, but rather that it did not need to reach this issue. Specifically, the Bureau stated:

> We need not decide whether WTVT's issuance of a series of rebates after the elections at issue supports Complainants' allegations of overcharges because we have already concluded that Lawton Chiles has established a *prima facie* case with respect to the issue of overcharges during the LUC period.

Order at para. 10.

[24] *See Public Notice, Licensees and Cable Operators Reminded of Lowest Unit Charge Obligations*, 4 FCC Rcd 3823, 3824 (1988). Moreover, the Commission has recently reaffirmed this obligation, stating that licensees must "review their program logs periodically during the election period to determine whether rebates are required, and issue any such rebates or credits promptly." *Political Programming Policies*, 7 FCC Rcd at 694. In addition, in June 1992, the Commission clarified in its reconsideration of *Political Programming Policies* that, if a rebate is issued, an appropriate notation should be placed in the contract or in another document in the political file, identifying at a minimum the amount and date of the rebate and the order to which it relates. *See* 7 FCC Rcd at 4621. We do not believe that audits conducted to comply with the requirement to provide rebates can be deemed "efforts to settle."

[25] WTVT does not allege that its audits were conducted in anticipation of litigation, and therefore they are not privileged as attorney work product. We note that, to encourage voluntary settlements, we would consider documents related to audits conducted *specifically* to facilitate settlement beyond the scope of any document production order. In this case, WTVT did not conduct its audits in an "effort to settle," but rather it characterized its audits as being conducted in the normal course of business as "a routine year-end reconciliation of all of the station's accounts." WTVT's March 2, 1992, answer at 6. Thus, we believe that documents related to these audits should be produced to Complainants.

[26] Complainants also point out that not a single preemptible spot was purchased by Complainants prior to September 27, 1990. Complainants assert that, had a cover sheet been provided, preemptible spots "would certainly have been purchased, unless Complainants were improperly steered toward purchasing fixed rates." This allegation was not contained in Complainants' original complaint, and thus will not be considered. In any event, we note that this claim is made without any supporting evidence or arguments.

purchased were entitled to, but not accorded, such treatment. WTVT also notes that it disclosed in its rate card the fact that its pricing was demand based, and fluctuated daily.

34. Complainants finally ask the Commission to overturn the Bureau's October 28, 1992, *Modification of Order*,[27] in which the Bureau, pursuant to Section 1.113(a) of the Commission's rules,[28] modified its *Order* to extend by thirty days the dates for commencement and conclusion of discovery. Complainants argue that the Bureau in the *Modification of Order* effectively granted WTVT's motion for stay without allowing Complainants an opportunity to respond. Complainants further assert that the reasoning set forth in the *Modification of Order* -- specifically, the pendency of the election and the fact that this is the first case to be handled pursuant to the *Declaratory Ruling* -- is unpersuasive.

35. WTVT responds that Complainants' procedural attack on the *Modification of Order* is premised on a misconception of that decision, which was within the discretion of the Bureau pursuant to Section 1.113(a) of the Commission's rules.

B. Discussion

36. Discount rates and privileges. The Commission in the *Declaratory Ruling* made clear that complainants alleging a violation of Section 315(b) will be required to establish a *prima facie* case as follows:

> This must, at minimum, consist of a short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested. This requirement could be met by a simple recitation of a sequence of events showing that, if all allegations are accepted as true and all inferences are drawn in the complainant's favor, the complaint would reasonably lie.

Complainants have failed to establish a *prima facie* case on the issue of disclosure of discount rates and privileges in the manner required in the *Declaratory Ruling*. In their original complaint in this proceeding, Complainants argued that the use of a one-rate and two-rate rate card constituted a failure to make available all discount rates and privileges. WTVT responded that the cover sheet to its 1990 rate card, which was provided to Complainants as part of WTVT's rate card, made clear that preemptible rates were available on request. In their Reply to Answer, Complainants argued as follows:

> Further, WTVT has not demonstrated that the cover sheet was provided to any or all of the Complainants. Indeed, in at least one case, Complainants will demonstrate that the cover sheet was not provided.

37. This statement by Complainants is insufficient to demonstrate that they are entitled to the relief requested.[29] No sequence of events are recited -- indeed, Complainants fail even to name the candidate who allegedly was not provided with a cover sheet.[30] We therefore affirm the Bureau's finding on this issue.[31]

38. **Increase in rates.** Complainants' argument that the Bureau made an erroneous finding with respect to the issue of an improper increase in rates by WTVT is also rejected. Complainants appear, in part, to be alleging that WTVT discriminated between candidates and commercial advertisers in the application of a station practice that enhances the value of advertising spots -- namely, by applying a contracual provision regarding the "locking in" of rates under contract to commercial but not political advertisers. We agree with Complainants that, pursuant to Section 73.1940(b)(2) of the Commission's rules in effect in 1990,[32] candidates must be afforded the same contractual benefits as commercial advertisers with respect to the "locking in" of rates. However, there is no evidence in the

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[27] DA 92-1492.

[28] 47 C.F.R. Section 1.113(a).

[29] Complainants suggest the following analysis for determining whether a *prima facie* case has been established:

> Where there is a question of fact, all issues must be resolved in favor of Complainants for purposes of determining whether a *prima facie* case has been established. Any allegations to the contrary made by WTVT simply raise a question of fact, which can only be resolved after discovery, an [sic] the filing [sic] amended complaint and answer to the amended complaint.

WTVT correctly notes that the Bureau reviews both the complaint and the answer in determining whether a *prima facie* case has been made. As the Commission concluded in the reconsideration of its *Declaratory Ruling*, the procedures adopted were "designed to protect the legitimate interests of both parties to the complaint." 7 FCC Rcd at 4127. Had we not intended the Bureau to take into account both the complaint *and* the answer in determining whether a *prima facie* case has been established, we would not have provided procedures for the filing of an answer in the first instance. Moreover, Complainants have not pled with sufficient specificity for the Commission to conclude that a question of fact has been raised.

[30] Complainants could also have provided an approximate date of the single alleged instance in which Complainants have intimated that the cover sheet was not provided, the circumstances surrounding this failure, and the name of the candidate's media buyer, if any. A vague, general allegation such as that made by Complainants puts WTVT at a severe disadvantage in responding, and cannot be deemed adequate to raise a question of fact. Even in their November 24, 1992, reply Complainants fail to specifically state that any particular candidate, or his buying agent, did not receive the WTVT cover sheet. Complainants' November 24, 1992, reply at 2. In contrast, WTVT specifically stated that all of the candidates were represented by media buyers, and that cover sheets were given to all media buyers. WTVT's March 2, 1992, answer at 17.

[31] We also reject Complainants' reliance on *KDFW-TV Inc.* in support of its argument that WTVT's rate cards did not comply with the Commission's rules then in effect. 6 FCC Rcd 7491 (MMB 1991). We note that the licensee in *KDFW-TV Inc.* failed to provide information regarding immediately preemptible rates, a time-sensitive make good policy, and other discount privileges. Unlike the licensee in *KDFW-TV Inc.*, WTVT did disclose that it sells time on a demand-rate basis, and that preemptible rates were available. As discussed above, Complainants here have provided no support for their allegation that other discount rates or privileges were not disclosed.

[32] Section 73.1940(b)(2) provides, in pertinent part, that:

> All discount privileges otherwise offered by a station to commercial advertisers shall be available upon equal terms to all candidates for public office.

record before us that WTVT discriminated against Complainants by failing to adhere to this contractual requirement.

39. The contractual provision at issue provides, in pertinent part, that "no increase shall be applicable to telecasts under contract or renewals thereof until...three months from the effective date of such new rate card." Thus, for nonpreemptible or preemptible time, the rate quoted in the contract cannot be increased for at least three months if, for example, there is a ten percent, across-the-board increase in the station's rates. However, candidates and commercial advertisers purchasing preemptible time at such a "locked-in" rate run the risk of being preempted by other advertisers subsequently paying a higher rate for the same time period if demand for a given time period is high.[33] If an advertiser is preempted, the station will attempt to schedule a make good or provide the advertiser with a credit where a make good cannot be provided.[34]

40. Thus, WTVT would have violated the terms of its contract with a commercial or political advertiser only if it increased the rates for spots *under contract* pursuant to a subsequent across-the-board increase in the station's rates, but not if it preempted an advertiser who paid a "locked-in" rate. Complainants have not demonstrated that the price of a spot it contracted for was increased after the contract was entered into. Moreover, based on the candidate invoices and rate cards submitted by WTVT in its March 2 answer, it appears that, to the extent that candidates' spots ran during the same periods as those of advertisers who paid lower, locked-in rates, candidate rates were, in fact, adjusted downward from the rate listed on the rate card. Thus, candidates did receive the same contractual benefits as commercial advertisers purchasing at "locked-in" rates. In short, there is no evidence that WTVT discriminated between commercial and political advertisers in the application of its policy for locking in rates.

41. In a related argument, Complainants allege that WTVT inappropriately increased its rates on a daily basis, contrary to Commission policy. Complainants argue that the Commission permits rate increases during pre-election periods only if pursuant to the station's "ordinary business practices," which include increases by stations that sell time on weekly rotations.[35] Complainants conclude from this statement by the Commission that only weekly rate increases by a station are acceptable, whereas daily increases are unacceptable. According to WTVT, its daily differences in rates are due to differences in demand on different days of the same week. WTVT notified candidates in its rate cards that, "WTVT utilizes a demand rate pricing system, therefore the lowest unit rate may change daily."

42. Based on our review of the invoices and other documentation contained in the record, we find that differences in WTVT's rates for the same program on different days of the same week appear to be pursuant to the "ordinary business practices" of the station. Moreover, the *Political Programming Policies* decision did not preclude daily differences in rates due to a demand based system of pricing for preemptible time, as used by WTVT. The Commission's list of possible reasons for increasing rates during the preelection period, and the reference to weekly rotations, was illustrative only, and not all-inclusive. Because Complainants have failed to demonstrate that such differences in rates were due to anything other than the station's demand rate method of selling, which is an ordinary business practice of the station, we find that WTVT's daily differences in rates were not contrary to Commission policy.

43. Finally, Complainants point out that candidate Bob Martinez paid a different price for the Oprah Winfrey Show on different days of the same week,[36] alleging that this program is sold on a "weekly rotation basis."[37] If, indeed, a program is sold on a weekly rotation basis -- that is, an advertiser pays a certain rate for a spot to run on Oprah Winfrey on one day between Monday and Friday -- we would not expect the rates for Oprah Winfrey to differ on different days of the same week. However, upon review of the "Order Worksheets" for candidates which WTVT attached as Exhibit 10 to its answer, it appears that Oprah Winfrey and other daily programs are sold by WTVT on a daily basis, or on a rotational basis through different days of the week on two or more days.[38] Thus, differences in the price of Oprah Winfrey on different days of the same week are possible, depending on the demand for this show on any given day. In fact, the Order Worksheet pertaining to the Martinez purchase of Oprah Winfrey challenged by Complainants indicates that Mr. Martinez purchased three spots during Oprah Winfrey to air one time per day on Monday, Wednesday and Friday during the week of October 22, 1990 (see headline number 1195534). Thus, it is apparent that Oprah Winfrey was not sold to Mr. Martinez on a weekly rotation basis as alleged by Complainants,[39] but on a daily basis. Therefore, the daily fluctuations in rates questioned by Complainants do not appear to conflict with our rules.

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47 C.F.R. Section 73.1940(b)(2). *See also Hernstadt v. FCC*, 677 F.2d 893, 902 (D.C. Cir. 1981). We note that this obligation is now contained in Section 73.1942(a)(1)(i) of the rules, as modified in *Political Programming Policies*, 7 FCC Rcd at 701.

[33] WTVT in its September 17, 1990, rate card indicates that: Preemptible level is defined as those rates purchased on the station which are negotiated rates and as such are subject to preemption without prior' notification. All attempts will be made to work with advertisers in re-scheduling like make goods for preempted spots, but credits may be issued in circumstances where make goods cannot be worked out. (Emphasis in original.)

[34] Presumably, the preempted advertiser could also submit an order for the original time period at a higher rate. However, in that case, the station would have fulfilled its obligations under the original contract, and the advertiser would be coming in under a new contract.

[35] Complainants cite to *Political Programming Policies*, 7 FCC Rcd at 693-94, in support of this proposition.

[36] Complainants point out that Mr. Martinez paid $400 for Oprah Winfrey on October 22, 1990, and $500 on October 23, 1990.

[37] In support of this allegation, Complainants cite to WTVT's rate card. However, we note that it is not clear, on the face of the rate card, whether Oprah Winfrey is sold on a weekly rotation basis. To the contrary, as discussed above, the Order Worksheets indicate that the show was not sold on a weekly basis.

[38] An example of such a rotation is one spot to air between 6:00-7:00 p.m., Tuesday through Thursday (see "Order Worksheet" for Chiles, headline number 1193523).

[39] *See* Complainants' November 24, 1992, reply at 5.

44. **Modification of Order.** Finally, we reject Complainants' allegation that the *Modification of Order* was contrary to the Commission's rules. The *Modification of Order* was issued pursuant to authority in Section 1.113(a) of the rules, which provides that:

> Within 30 days after public notice has been given of any action taken pursuant to delegated authority, the person, panel, or board taking the action may modify or set it aside on its own motion.

The Bureau thus was well within its authority to modify its *Order* to extend the dates for commencement and completion of discovery.[40]

III. CONCLUSION AND ORDERING CLAUSES

45. Based on our analysis of the Applications for Review filed by WTVT and Complainants, and the related pleadings, we affirm the Bureau's *Order* in its entirety with respect to the estabiishment of a *prima facie* case against WTVT. We further affirm the Bureau's *Order* with respect to the scope of, and procedures for, discovery, except to the extent indicated herein. These limited modifications to the Bureau's *Order* are set forth in the attached revised Appendices A, B, and C, which outline the documents and interrogatories that must be produced by Complainants, and the timetable for discovery and post-discovery.

46. ACCORDINGLY, pursuant to Section 1.115 of the Commission's rules, 47 C.F.R. Section 1.115, WTVT's Application for Review of the scope of discovery in this proceeding is GRANTED to the extent indicated herein and DENIED in all other respects, and Complainants' Application for Review is DENIED.

47. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i) and (j), 303(r), and 315(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i) and (j), 303(r), and 315(b) and (d); Section 5(e) of the Administrative Procedure Act, 5 U.S.C. Section 556(e); and Section 1.115 of the Commission's rules, 47 C.F.R. Section 1.115, that the *Order* and *Modification of Order* in this proceeding are otherwise AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

DOCUMENTS TO BE PRODUCED TO COMPLAINANTS

Certain documents shall be produced to Complainants by WTVT by delivering them to the offices of Barnes, Browning, Tanksley & Casurella, 166 Anderson Street, Suite 225, Marietta, Georgia 30060 in accordance with the procedures outlined in this modified *Order*. The documents to be produced are as follows:

1) All advertising contracts executed by or on behalf of candidates for public office in connection with the 1990 primary and general elections.

2) All invoices, logs or other documents recording time, duration, or class of advertising time for each political advertisement ordered and/or aired on behalf of candidates for public office in connection with the 1990 primary and general elections.

3) Copies of invoices and contracts for, and program logs related to, all commercial time run on the station beginning on July 21, 1990 and running through September 3, 1990 (the 45 days preceding the relevant primary election), and copies of invoices and contracts for, and program logs related to, all commercial time run on the station starting on September 7, 1990 and running through November 6, 1990 (the 60 days preceding the relevant general election). This should include:

> a) All invoices, logs or other documents recording time, duration, or class of advertising time for each commercial spot aired;
>
> b) All long term contracts that pertain to commercial spots, including make goods and bonus spots, that aired during these periods;
>
> c) All addenda or memoranda relating to these invoices or contracts that alter or otherwise address the terms or provisions of any document subject to production pursuant to this document production order;
>
> d) All orders for commercial spots aired during these periods, including confirmation orders or contracts;
>
> e) All orders for bonus spots, public service announcements, or any other type of free spots, for any of the commercial advertisers who purchased time that ran during these periods; and
>
> f) All documents that describe the rate and other relevant terms (those that affect price or have a direct bearing on the characteristics, such as class of time, of each spot) of discount packages sold to commercial advertisers that included spots that aired during these periods.

4) All documents used by the station to explain to its sales personnel or other employees or agents dealing with political campaigns, or the agents of political campaigns, the application of the lowest unit charge provisions of Section 315(b) of the Communications Act. This should

[40] As to Complainants' argument that they were not provided with an opportunity to be heard on the motion for stay, which was mooted by the *Modification of Order*, we note that Section 1.45(e) of the Commission's rules also specifically provides that the Commission may rule ex parte on requests for temporary relief (which include a motion for stay), without waiting for the filing of oppositions or replies. 47 C.F.R. Section 1.45(e).

include any written policy statement(s) used by the station in 1990 which directly or indirectly related to the station's pricing policies.

5) All documents reflecting the existence, implementation, and results of any audit of rates charged to political advertisers performed by or on behalf of the station with respect to the 1990 primary and general elections, including any provision of rebates to such political advertisers, as well as all documents explaining or detailing the methodology used by the station in performing any such audit or providing any such rebates.

APPENDIX B

ADDITIONAL INFORMATION TO BE PROVIDED TO COMPLAINANTS

Answers to the following interrogatories shall be provided to Complainants in accordance with the procedures set forth in this modified *Order:*

1) Describe how WTVT arrived at its lowest unit charge ("LUC") in 1990.

2) Detail any actions taken by WTVT to ensure that political advertisers were, in fact, charged the lowest unit rate for the same class and amount of time during the same time periods which ran during the 1990 statutory LUC periods. This should include the identities of all individuals taking or participating in such action, identifying their position at the station, and should identify all documents which refer to or formed a part of the station's efforts to ensure that candidates received the LUC.

3) Provide a statement that indicates the class and length of each commercial spot, if not apparent from the program logs, invoices or contracts, that aired during the relevant time periods.

4) Provide a statement that explains any codes used by the station or its sales representatives to indicate the rate, section or class of spot identified in confirmation contracts, program logs, affidavits of actual broadcast or other documents relating to advertising rates.

APPENDIX C

TIMETABLE FOR DISCOVERY AND POST-DISCOVERY

First day of discovery period:	12/2/92
Documents in Appendix A and Answers to Written Interrogatories in Appendix B due:	12/2/92
Request by Complainants for further discovery (production of additional documents, answers to additional written interrogatories, and/or for the taking of depositions) due:	12/16/92
Opposition by station to Complainants' request for further discovery due:	12/21/92
Station request for discovery (production of documents, answers to written interrogatories, and/or for the taking of depositions) due:	12/21/92
Opposition by Complainants to station request for discovery due:	12/28/92
Documents and answers to written interrogatories (if allowed by Bureau) pursuant to station's request for discovery due:	1/15/93
Production of additional documents and/or answers to additional written interrogatories (if allowed by Bureau) pursuant to Complainants' request for further discovery due:	2/1/93
Final day of discovery period:	2/1/93
Complainants' amended complaint due:	3/3/93
Station's answer to amended complaint due:	3/18/93
Joint notice of election of complaint resolution procedure due:	3/29/93

Separate Statement of Commissioner James H. Quello, Concurring in Part and Dissenting in Part.

In re: Complaint of Lawton Chiles, Bob Martinez, and Bill Nelson Against Station WTVT(TV), Tampa, Florida.

The *Memorandum Opinion and Order* in this case upholds a discovery order resulting from a political broadcasting lowest unit charge complaint and, at the same time, limits the scope of discovery.

As the first occasion for the Commission to rule on a discovery order in a political broadcasting proceeding, this case has important policy ramifications. To a large extent, it will determine whether the Commission has created workable procedures or instead created an administrative morass that will ill-serve candidates, broadcasters and the FCC.

So long as the discovery procedures remain part of the complaint process, it is important to implement them in as rational a way as possible. Accordingly, I concur with the Commission's decision to narrow the scope of discovery. However, making an order as rational as possible under the circumstances is not the same thing as making it rational. I am concerned that the decision approved in this *Memorandum Opinion and Order* is procedurally deficient, that it overlooks key requirements for making a *prima facie* case and that it perpetuates a cumbersome and counterproductive process. With respect to these aspects of the decision, I dissent.

The Mass Media Bureau noted in its decision in this case that the complainants failed to support their allegations with affidavits and neglected to indicate what time period was included in the market data at the heart of the complaint. Rather than confront these deficiencies, the Bureau merely noted that "in the future, we would prefer that complaints be supported by declarations of the candidates in accordance with Section 1.16 of the Commission's rules." *In re Complaint of Lawton Chiles, Bob Martinez, and Bill Nelson Against Station WTVT(TV), Tampa, Florida*, 7 FCC Rcd. 6661, 6662 n.6 (Mass Media Bureau 1992). With respect to the factual showing, it "caution[ed] complainants in the future to provide the Commission with more precise information regarding the manner in which [market] data is utilized." *Id.* at 6662 n.8.

Although the procedural issue was not raised in the Application for Review, I had hoped that the Commission — in setting the standard for political broadcasting complaints — would seek to ensure that the watershed case would be free of obvious defects. We should be prepared to apply our procedural rules now, and not simply hope that complaints meet the Commission's standards at some point "in the future."

Far more troubling is the Commission's use of market data in this case. The complaint is based on Spot Quotations and Data, Inc. ("SQAD") analyses that list cost-per-point information each month in selected markets.1 The Bureau found that complainants had established a *prima facie* case and ordered discovery because of SQAD data "demonstrating that the rates paid by candidates for use of WTVT's facilities . . . were higher than the *average rates charged by stations in the Tampa market.*" *Id.* at 6662 (emphasis added).

There are two significant problems with this finding: it ignores the influence of class of advertising time on lowest unit charge determinations and it focuses on average rates in a market rather than the rates of a specific station.2

Obviously, the only way to know whether a station is providing candidates the lowest unit charge is to examine the rates of that station, and not another. As the Chief of the Commission's Political Broadcasting Branch noted informally last February:

> The *prima facie* case has to be based upon the facts relevant to that particular station. And, what we're looking for is, is there a difference between the rates charged commercial advertisers versus the rates charged political candidates and that can only be determined on that particular station's universe.

Remarks of Milton O. Gross, FCC Brown Bag Lunch, February 25, 1992 (transcribed from audio tape).

We get into very dangerous territory when we assume that a station may be violating Section 315(b) if its rates exceed the average rates in a community. The highest rated stations will always command higher rates; the lower rated stations will charge less. To base our evaluation on the average threatens to penalize the most popular stations and paradoxically insulate from review those with lower ratings.

The Commission attempts to address this issue by noting that the SQAD market averages (cost-per-point) were multiplied by "station-specific ratings information." *Memorandum Opinion and Order* at ¶ 9. That is, the WTVT ratings for a given daypart were multiplied by the average cost-per-point (based on SQAD) to obtain a benchmark rate for evaluating the complaint. While this approach acknowledges the conceptual problem the Commission faces, it unfortunately begs the question in answering it.

No matter how many times you multiply the SQAD data by other numbers, you still end up with an average market rate. It will always be an average, because the cost-per-point is calculated by aggregating rates from various stations in the market. The Commission's approach, without analysis or justification, assumes that all stations in a given market charge the same cost-per-point. But the fact is, the top stations in a market generally will charge rates that exceed the market average. Thus, even with the modified approach in the *Memorandum Opinion and Order*, the Commission's analysis is not a reliable indicator of Section 315(b) compliance in that it discriminates against higher rated stations.3

Even if the Commission's analysis was specifically directed toward the station under review and not a market average, its failure to account for different classes of time is astonishing.

During the past two years, the Commission repeatedly has shown its awareness of the importance of class of time in making lowest unit charge findings. In the 1990 political broadcasting audit, for example, the Mass Media Bureau found that "candidates paid more for broadcast time than commercial advertisers in virtually every daypart" at 80 percent of the stations surveyed. *Mass Media Bureau Report on Political Programming Audit*, Public Notice No. 4728 (September 7, 1990) at 3. The Report accounted for the difference by noting that "candidates purchased time at non-preemptible 'fixed' rates while commercial advertisers purchased time at 'preemptible' rates," *id.* at 5, and in the end, the Commission found that only seven percent of the stations surveyed had violated the lowest unit charge rule. *See, e.g., Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act*, 6 FCC Rcd. 7511, 7517 (1991) (Separate Statement of Commissioner James H. Quello, dissenting in part) ("*Declaratory Ruling*").

This understanding of the importance of class of time permeated the Commission's recent revision of the political broadcasting rules. In that proceeding, we expanded broadcasters' ability to create different classes of time for lowest unit charge purposes and to set different rates. *See Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 678, 690-92 (1992). The Commission now inexplicably undermines this policy by subjecting to greater risk of liability those stations that create new classes of time.

As with the question of average rates, the *Memorandum Opinion and Order* responds to, but does not answer, this concern over class of time. It notes that "SQAD is a source of industry data on average rates [that] is currently the best source available for a candidate" and that "WTVT has not presented the Bureau with sufficient information regarding the manner, if any, in which SQAD data takes into account class of time." *Memorandum Opinion and Order* at n.13. It also points out that the Commission "specifically endorsed the use of such data on average rates in the *Declaratory Ruling*." *Id.* (quoting footnote 47, to the effect that "A *prima facie* case of a violation would otherwise be difficult, at best, to demonstrate . . . .").

Aside from the fact that the Commission by this action reverses the burden of proof on the lowest unit charge by class of time, it also omits the context in which the use of such data was "specifically endorsed." In footnote 47 to the *Declaratory Ruling* in which the Commission approved the use of average market data as part of a lowest unit charge complaint, we emphasized that:

> [A] complainant could make a *prima facie* case by using generally-available industry or statistical data on average rates to support its belief that the rate paid by a candidate was higher than the average rate charged *by the station for the same class of time*.

Declaratory Ruling, 6 FCC Rcd. at 7521 n.47 (emphasis added).

In establishing procedures for political broadcasting complaints, it was never contemplated that the average rates at issue would not be station-specific or ignore the class of time. But in the instant order the Commission commits both errors.

These unfortunate policy choices tend to reinforce my concern that the Commission has created unworkable procedures that will further confuse this difficult area of our rules. At the time the procedures were approved, I wondered whether the new procedures would allow candidates to make a *prima facie* case and obtain quick relief or lead to undue delay. I found it difficult to imagine that we could expect much speed from "a new multi-stage procedure that includes a complaint, discovery, an amended complaint and several levels of Commission decisions including the possibility of hearings." *Declaratory Ruling*, 6 FCC at 7516-17 (Separate Statement of Commissioner James H. Quello, dissenting in part).

The complainants in this proceeding will be lucky if the discovery phase is completed by February 1993 — the one year anniversary of the complaint. Even under the narrower discovery order approved by the Commission, I understand that over 80,000 documents have been provided.[4] And we are only at the initial stage of the proceeding.

For the reasons stated above, I dissent, in part.

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[1] Cost per point is an estimate of the proportional price for delivering a percentage or rating point of national spot television audience for a designated population.

[2] SQAD reports are not — and were never intended to be — a specific measure of a station's rates. As SQAD noted in its 1990 reports:

> The SQAD report is composed of averages and is to be used as a yardstick and guide only, without representation or warranty that time buyers will be able to match the indicated costs and further that buying negotiations occur daily while the SQAD report is published monthly.

See Answer of WTVT, Inc., filed March 2, 1992 at 12. Evidently aware of this deficiency, complainants submitted additional data from *Spot Cost Outlook and Projections* ("SCOOP"), a product of *Media Market Guide*. However, in a declaration filed with the Commission, the publisher of SCOOP data noted:

> We publish data by market only and do not publish any data concerning rates on individual stations. . . . SCOOP is not intended to reflect actual costs in a market and any attempt to use SCOOP data to reflect actual costs in a market would be inaccurate. We have never authorized anyone to use SCOOP data to reflect actual advertising costs and would not do so.

See WTVT, Inc.'s Motion to Strike, filed March 17, 1992, Exhibit 1.

[3] This inequity is pronounced in this case, since WTVT was the highest rated station in the Tampa market for the period under review. *Answer of WTVT, Inc.*, filed March 2, 1992 at 13. Additionally, one of the network affiliates in the market has a weak signal, further exacerbating the disparities. *Id.* at 12.

[4] On December 15, 1992, complainants requested further discovery, including 27 interrogatories, the production of seven categories of documents and depositions of 38 persons. Complainants' Request for Further Discovery (filed December 15, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 23, 1992

Released: December 23, 1992

IN REPLY REFER TO:
7310-13/1700A

Mr. David E. Weisman
Meyer, Faller, Weisman and Rosenberg, P.C.
4400 Jenifer Street, N.W., Suite 380
Washington, D.C. 20015-2113

Dear Mr. Weisman:

This is in response to your letter of November 6, 1992 on behalf of an Ad Hoc Specialized Mobile Radio (SMR) Industry Group ("SMR Group") comprised of Advanced Mobilecomm, Inc., American Mobile Systems, Inc., Dispatch Communications, Inc., Johnson Communications, Inc., PowerFone, Inc., Questar Telecom, Inc. and the SMR Council of the National Association of Business and Educational Radio (NABER). This SMR Group requests clarification and interpretation of certain Commission rules and policies relating to applications for so-called 800 MHz "wide area SMR systems."[1]

To date, we have granted three waiver requests to permit the creation of wide area SMR systems. These three actions involved Fleet Call, Inc. (Fleet Call),[2] Mobile Radio New England (MRNE)[3] and Advanced Radio Communication Services of Florida, Inc. (Advanced).[4] We currently have pending approximately fifteen additional requests to create wide area SMR systems, with associated applications and waiver requests. We also have pending four petitions for rule making that, generally, involve the subject of wide area SMR systems.[5] We anticipate that issues surrounding the entire concept of wide area SMR systems will receive full treatment during public participation in these pending rule making matters. In the meantime, this letter summarizes existing precedent that will govern our handling of these types of waiver requests.

Precedent for Waiver of Our Construction Rules to Establish Wide Area Systems

The licensing and use of the 800 MHz SMR Service is governed by Subpart S of Part 90 of the Commission's Rules, 47 C.F.R. Part 90, Subpart S. Stations authorized on SMR frequencies in the SMRS Category are generally afforded protection on the basis of a fixed mileage separation criterion of 70 miles.[6] In most cases 800 MHz SMR stations are trunked to achieve spectrum efficiency and are licensed in five channel blocks.[7] A licensee of a trunked SMR station may not obtain another such station within forty miles of the existing station unless the existing station is loaded to at least 70 mobiles per channel.[8]

Waiver of the Commission's Rules is, of course, appropriate only where unique circumstances are involved and there is no reasonable alternative solution within existing rules.[9] In this regard, the initial proposals of Fleet Call, MRNE, and Advanced to increase spectrum efficiency substantially through digital technology and frequency reuse in spectrum-depleted markets, while generally consistent with 47 C.F.R. Part 90, Subpart S, presented uniquely compelling circumstances. We granted these applicants limited construction time relief due to the magnitude and complexity of the proposals. The precedents established by grant of these waiver requests are, therefore, controlling in defining the current criteria for disposition of the pending waiver requests to establish wide area SMR systems.

We have granted 800 MHz wide area SMR system requests only where the proposed systems are in (1) a waiting list area, (2) an area where the frequencies of the SMR stations included in the wide area SMR system are used so extensively by the applicant that the frequencies could not be used by any other applicant to develop a viable system, or (3) any other area where no additional 800 MHz channels are available.[10] Further, in processing these requests we considered a single wide area SMR system to be limited to a geographic area defined by the contiguous and overlapping service areas of stations that are (1) constructed and placed in operation, and (2) currently licensed to or managed by an applicant.

---

[1] Typically, requests for "wide area SMR systems" seek reuse of large numbers of frequencies at multiple low-powered sites for digital SMR systems. The systems are generally composed of SMR stations licensed to or managed by the entities filing the requests and may also include applications for such stations. Many of these applications for "wide-area SMR systems" are for areas defined by contiguous or overlapping service areas of existing or proposed SMR stations. Applicants often refer to these areas as the "footprint" of the system.

[2] *See* Fleet Call, Inc., 6 FCC Rcd 1533 (1991).

[3] *See* Letter from Richard J. Shiben, Chief, Land Mobile and Microwave Division, Private Radio Bureau, to George Hertz, President, Advanced MobileComm of New England, Inc. (April 13, 1992).

[4] Reference 1992 grant of applications assigned file numbers 553493 through 553499. These applications were associated with a Request for Rule Waiver filed by Advanced on July 15, 1991.

[5] *See* Petition for Rule Making of NABER dated March 6, 1992 (RM 8028); Petition for Rule Making of NABER dated March 13, 1992 (RM 8029); Proposal for Modification of the 40 Mile Rule of A&B Electronics, Inc. dated May 7, 1992 (RM 8030); and Petition for Rule Making of the American Mobile Telecommunications Association, Inc., dated October 26, 1992 (RM 8117).

[6] *See generally* 47 C.F.R. § 90.621. As a result, frequencies may become exhausted in a geographic area. An SMR waiting list is usually maintained in such areas.

[7] 47 C.F.R. § 90.621(a)(1)(iv).

[8] 47 C.F.R. § 90.627(b). We have interpreted this section to allow applicants for wide area SMR systems to demonstrate that their existing facilities are "aggregately loaded" to at least 70 mobiles per channel and, thus, that they comply with Section 90.627(b) and may be assigned additional channels. *See, generally*, 47 C.F.R. § 90.621(a)(1)(iv).

[9] 47 C.F.R. § 90.151.

[10] *See* Fleet Call, Inc., 6 FCC Rcd 1533, 1535 (at para. 17) (1991); Request for Rule Waiver filed by MRNE dated October 28, 1991, at 8; Request for Rule Waiver filed by Advanced dated July 15, 1991, at 8-9 and 15, n.23.

Applicants have generally defined the service area of an SMR base station as the area within a 35-mile radius of the coordinates of the station.[11] These contiguous or overlapping service areas define an area where a successful waiver applicant has *de facto* temporary frequency exclusivity for an extended construction period, based on all channels licensed at all existing, constructed, full-facility sites. In conjunction with the waiver request, during the extended construction period each new site must be separately licensed to be included in the proposed wide area system. At the end of the extended construction period, the applicant's sites that have been constructed and placed in operation receive the co-channel protection afforded under the rules, and, therefore, at that time the so-called original "footprint" has no further relevance.[12]

Finally, we have permitted applicants for wide-area systems to employ the concept of aggregate loading in order to satisfy the so-called "40-mile rule."[13] In so doing we calculate the loading for the stations that an applicant seeks to combine into a wide area SMR system by dividing the total number of mobiles/controls associated with those stations by the total number of discrete channels licensed within the "footprint."[14]

Again, our precedent described herein is controlling in clarifying the current parameters for acting on waiver requests proposing wide area 800 MHz systems pursuant to authority delegated to the Private Radio Bureau. In this regard, until the issues raised in the various pending petitions for rule making are fully explored in a docketed proceeding, the Private Radio Bureau will act on waiver requests only for proposals that fall squarely within the scope of this precedent. Waiver requests falling outside the parameters established by precedent or otherwise raising new or novel questions can only be acted upon by the Commission. *See* 47 C.F.R. § 0.331.

Mobile Counting, Aggregate Loading, and "Footprint" Concepts

Based on a reading of the SMR Group's letter, it appears that some applicants believe that they may count a mobile/portable more than one time for a single wide area SMR *system*. These applicants apparently derive this view from an erroneous interpretation of the Commission's actions in the *Report and Order* in PR Docket No. 92-79.[15]

In PR Docket No. 92-79 we eliminated separate licensing of end users of SMR systems.[16] An SMR system may be comprised of numerous base stations integrated into a wide area service offering, or it may take the form of a "stand-alone" base station offering a more traditional type of SMR service. Because we realized that SMR systems licensed to or managed by different entities do not typically have access to the business records of one another and are often business competitors, and that a single end user may in unusual circumstances obtain primary service from more than one SMR system, we stated that we would credit individual SMR systems with all operational end users in their business records, including those end users who do business with more than one *system* in their area.[17] This was never intended to vitiate the general proposition that a single mobile/portable should be counted only one time for each SMR system.[18] Indeed, an applicant may count a single mobile/portable once, and only once, for one SMR system, wide area or not.[19]

Elimination of end user licensing did not change basic assumptions that there is a correlation between channel loading and channel occupancy. Mobile loading is intended to be an indicator of need for channel capacity. Thus a single mobile unit cannot occupy as much channel capacity as two, three, or six mobiles.

Where a licensee has relied on the aggregate loading concept to satisfy 40-mile-rule requirements and establish a "footprint" for development of a wide-area, high-capacity digital system, a single mobile may be counted only once on that system, even if it operates on multiple sites within that system. If an end user operates a mobile station on more than one system, where the system operators would have no reason or opportunity to be familiar with each others' business records (*e.g.*, they are not commonly-owned or managed systems or participants in a common roaming agreement), that mobile may be counted fully on each such system for which it is carried in the business records as an end user. When a mobile operates on commonly owned or managed systems, it may be divided among systems such that it counts no more than once, consistent with previous policy.[20]

The SMR Group also seeks guidance on the degree to which "extensions of the footprint" would be permissible as part of a wide area SMR system waiver request. As we have indicated earlier, we consider a single wide area SMR system limited to a geographic area defined by the contiguous and overlapping service areas of stations that are (1) constructed and placed in operation, and (2) currently licensed to or managed by an applicant. Thus, a wide area SMR waiver applicant may not include service areas of

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[11] *See, e.g.*, Fleet Call, Inc., 6 FCC Rcd 1533, 1534 at para. 9; Request for Rule Waiver of MRNE dated October 28, 1991, at 21, n.20.

[12] *See* Fleet Call Inc., 6 FCC Rcd 1533, 1535 (1991).

[13] *See* note 8, *supra*.

[14] Fleet Call, Inc., 6 FCC Rcd at 1535-1536. *See also*, letter of Richard J. Shiben, Chief, Land Mobile and Microwave Division, Private Radio Bureau, to Elizabeth R. Sachs (July 14, 1992).

[15] 7 FCC Rcd 5558 (1992).

[16] We did not, however, eliminate the SMR station loading requirements necessary for channel retention and the acquisition of additional channels.

[17] Report and Order, PR Docket No. 92-79, 7 FCC Rcd 5558, 5561 (note 30) (1992).

[18] Prior to elimination of end user licensing, we would permit an end user that was served by more than one SMR base station in a particular area to divide each mobile between no more than two base stations for purposes of establishing mobile loading. The Commission did not intend to prohibit this practice through elimination of end user licensing.

[19] To date, applicants generally have relied upon bare assertions of sufficient aggregate loading. To the extent that pending wide area applications do not adequately document aggregate loading, the Licensing Division will request, on a case-by-case basis, such additional information as they deem necessary to process these applications. Henceforth, as in *Fleet Call, Inc.*, applicants will be required to document aggregate loading. By way of example, a showing of aggregate loading should include, at a minimum, a listing of the number of mobiles/portables operating on each channel of each base station that defines the contiguous or overlapping service areas of the wide area system.

[20] Compliance with 47 C.F.R. § 90.658 requires the licensee to document the average number of mobiles and control stations that routinely transmit on the licensee's system.

unconstructed systems or systems applied for but not yet licensed. Such extensions would go beyond existing precedent.

I trust that this is responsive to your inquiry. We look forward to working with the SMR Group and all other interested parties to develop a meaningful regulatory framework for implementing wide area SMR systems and promoting the growth of innovative SMR offerings.

Sincerely,

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-296

In the Matter of

Simplification of the
Depreciation Prescription
Process

NOTICE OF PROPOSED RULEMAKING

Adopted: December 10, 1992; Released: December 29, 1992

Comment Date: March 10, 1993
Reply Comment Date: April 13, 1993

By the Commission: Commissioner Duggan concurring and issuing a statement.

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I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (*Notice*), we continue our efforts to reduce unnecessary regulatory burdens and their associated costs by undertaking simplification of our depreciation prescription process. Under our current depreciation prescription process, we prescribe depreciation rates by plant account for individual carriers.[1] In this *Notice*, we seek comment on proposals that would simplify procedures and reduce associated costs in our depreciation prescription process.

II. BACKGROUND

A. The Depreciation Process

2. Depreciation is the process of allocating the cost of plant over its service life. Section 220(b) of the Communications Act of 1934, as amended, states that:

> [t]he Commission shall, as soon as practicable, prescribe ... the classes of property for which depreciation charges may be properly included under

[1] *See* 47 U.S.C. §220(b), 47 C.F.R. § 43.43. We generally prescribe depreciation rates on a triennial basis. This results in our review of approximately one-third of the carriers for whom we prescribe depreciation rates each year.

operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property.[2]

Pursuant to this statutory mandate, the Commission prescribes depreciation rates for American Telephone and Telegraph (AT&T), Alascom Inc. (Alascom), and 33 local exchange carriers (LECs) representing 86% of the LEC industry, based on operating revenues.

3. This Commission determines depreciation rates by using the following formula:

$$\text{depreciation rate} = \frac{100\% - \text{accumulated depreciation}^{3} - \text{future net salvage\%}.}{\text{average remaining life}}$$

This formula contains two parameters which must be estimated: future net salvage (FNS) and average remaining life (ARL).

4. The FNS is the estimated gross salvage of plant less any estimated cost of removal.[4] The ARL is an average of the future life expectancy of investment in a particular plant account. The ARL is composed of two basic factors: a projection life and a survivor curve. The projection life is the life expectancy of new additions to plant. Considerations for determining the projection life are past life indications of plant in the particular account and the forecast for future conditions and company plans. The survivor curve is the expected retirement distribution (or survival distribution) of plant in an account over time. These two basic factors are then used to develop the future life expectancy of the investment at each age (or vintage) in that plant account,[5] and a composite of these expected lives result in an average remaining life or ARL.

5. Once the parameters are determined, a depreciation rate is computed. The carriers then apply the depreciation rate to the average plant account balance to calculate the depreciation expense for that account. The ultimate purpose of continually estimating depreciation rates is to develop rates, using the most current information, that most accurately allocate plant costs to expense at a rate representative of the actual consumption of the plant.

6. Because the basic factors composing the ARL, projection life and survivor curve, as well as the FNS, are estimates, they are the subject of detailed analyses. Carriers submit detailed studies to prove the merit of their estimates, as required by our rules.[6] A typical carrier submits studies totalling approximately 600 pages and averaging 20-25 pages of analysis per account. It is this part of the depreciation process we seek to simplify in this *Notice*.

B. Need for Simplification

7. Our current process for determining depreciation rates was born during the 1940's when there was no competition and little technological change in the telephone market. This process was refined over a period in which the Commission regulated telephone earnings on a rate of return/rate base basis.[7] A keen regulatory eye was necessary to ensure "reasonable charges" to ratepayers.

8. However, since this depreciation prescription process was put into place, the telecommunications industry has experienced considerable change. We now have significant competition in the interexchange market, emerging competition in the local exchange market, and more rapidly changing technology. We have recognized these changes, and have put in place a price cap regulatory plan designed to provide the incentives that occur in a competitive market. Our price cap plan encourages carrier efficiency without allowing them to pass depreciation expense changes onto ratepayers.[8] Thus, the scrutiny necessary under rate of return/rate base regulation may be relaxed under price cap regulation. At the same time, the telephone industry has estimated that the annual cost of determining the depreci-

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[2] 47 U.S.C. § 220(b).

[3] Accumulated depreciation is the amount of plant investment that has been depreciated for a particular plant account. In theory, upon retirement of plant, the accumulated depreciation will be equal to the cost of the plant less any net salvage. The purpose of using the accumulated depreciation component in the formula is to correct for any over or under depreciation accruals resulting from over or under prior life and salvage estimates.

[4] Gross salvage is the amount a carrier receives from disposing of retired plant. Cost of removal is the cost the carrier incurs in retiring plant through the removal and disposition of the plant.

[5] Instead of attempting to determine a future life expectancy for every asset in the account, we group assets by age, also known as a vintage group. We may further refine this grouping by subdividing the assets of the same vintage into equal life groups. This recognizes that assets placed into service in the same year do not necessarily have the same lives.

[6] 47 C.F.R. § 43.43.

[7] Under rate of return/rate base regulation, carriers are allowed to pass on their operating expenses to ratepayers; higher depreciation rates lead to higher depreciation expenses and thus to higher prices.

[8] We note that because price cap carriers would generally not be able to pass along depreciation expense changes, higher depreciation expense can lead to lower earnings for those carriers.

ation rates range from $35-$50 million industry-wide.[9] In light of market and regulatory changes and the alleged high costs of depreciation analysis, we begin this rulemaking to determine whether our detailed prescription process is necessary. We remain cognizant, however, that any streamlined procedures we adopt must be consistent with the Commission's statutory mandate to prescribe "the percentages of depreciation" carriers may charge to operating expenses.

III. DISCUSSION

9. In this *Notice*, we propose four options for simplifying the determination of depreciation expense: the basic factor range option, the range of rates option, the depreciation schedule option, and the price cap carrier option. The first proposal, the basic factor range option, would simplify the depreciation process by establishing ranges for the basic factors that determine the parameters used in the depreciation rate formula; the FNS, and the projection life and survivor curve (the basic factors that determine the ARL). This would eliminate the need for carriers to submit detailed studies in support of their proposed factors. Under this proposal, we would continue to prescribe depreciation rates using the current depreciation rate formula. Carriers would then apply the rates to their plant account balances to determine their depreciation expense.

10. The second proposal, the range of rates option, would simplify the depreciation process by establishing ranges for depreciation rates. Under this option, we would no longer focus on the basic factors used to derive the parameters for the depreciation rate formula, and more importantly, we would not use the depreciation rate formula to derive depreciation rates. However, carriers would continue to apply depreciation rates to their plant account balances to determine their depreciation expense.

11. The third proposal, the depreciation schedule option, would simplify the depreciation process by establishing a depreciation schedule for each plant account. Essentially, the schedule would be based upon a Commission-specified service life, retirement pattern, and salvage value for a particular account. Carriers would then apply the schedule to their investment by vintage.

12. The final proposal would affect only price cap carriers. The price cap carrier option would simplify the depreciation process by allowing price cap carriers to file depreciation rates with no supporting data, but continuing Commission prescription of depreciation rates. Price cap carriers would file their proposed depreciation rates, and the Commission would issue a Public Notice seeking comment on the proposed rates. The Commission would then prescribe depreciation rates based on the price cap carriers' proposals and the comments submitted thereon.

A. The Basic Factors Range Option

13. Using ranges for basic factors would allow the carriers to select their FNS, projection life, and survivor curve for each applicable account from within an established range. These basic factors would then be used to derive the parameters that determine the depreciation rate. Carriers would apply those rates to the applicable account balances to calculate their depreciation expense. This range option would simplify the current process because carriers would no longer be required to submit the detailed analyses to support their proposed projection lives, survivor curves, and FNS values. Eliminating these submissions should therefore produce an administrative costs saving.[10] This approach also would provide carriers with a greater degree of flexibility than they have experienced under past regulation of depreciation; they would be allowed to select basic factors from within the range while they previously were tied to one set of basic factors. We seek comment on this option.

1. Implementing the Basic Factor Range Option

14. We seek comment on the approach we should take initially to establish the basic factor ranges. We tentatively conclude that industry-wide data should serve as the initial basis for determining the ranges. We also tentatively conclude that ranges should be determined from a statistical analysis of basic factors underlying currently-prescribed rates. For example, we might review the industry-wide data on Motor Vehicles, Account 2112.[11] In establishing the range for the projection life for Motor Vehicles, we might calculate an average of the industry-wide projection lives underlying the prescribed rates for that account and then allow a range of one standard deviation below the average to one standard deviation above the average. We invite comments on this proposal and other alternatives. In discussing range proposals, commenters should address the appropriate width of a range. Commenters should also quantify the administrative costs savings resulting from this simplification approach.

15. We note that we prescribe depreciation rates for thirty-three LECs and two interexchange carriers (IXCs), AT&T and Alascom. We tentatively conclude that we should establish basic factor ranges for each group based upon their respective industry-wide data. We believe that the underlying considerations that go into estimating the basic factors are sufficiently different for the two groups that they should be considered separately.[12] We seek comment on this proposal.

16. We ask whether we should establish basic factor ranges for all plant accounts. We tentatively conclude that, at this stage of the proceeding, we should not. A number of plant accounts are not easily adaptable to ranges because their basic factors widely diverge from company to company and from prescription to prescription. Although we

[9] The industry has stated these estimates in a letter to the Office of Domestic Policy and the Council on Competitiveness, Office of the Vice President, dated January 24, 1992 ($50 million estimated), and in a submission to the Commission staff from the United States Telephone Association Ad Hoc Capital Recovery Task Group ($35 million estimated).

[10] We note, however, that this option would not eliminate the need for carriers to analyze underlying depreciation factors to determine the reasonableness of their depreciation expense. In fact, with a diminished Commission role in determining depreciation expense levels, we believe greater responsibility will be placed on the carriers and their independent auditors to impose the internal controls and review procedures that are necessary to ensure that reported depreciation expense is reasonable.

[11] 47 C.F.R. § 32.2112

[12] For example, the life characteristics for account 2212, Digital electronic switching, 47 C.F.R. §32.2212, would differ between the two groups; AT&T's digital switches are large, older toll switches, whereas the LECs' digital switches are predominantly newer local switches.

recognize that initially applying the range option to all accounts for which we prescribe depreciation rates would result in greater simplification and greater administrative costs savings, we believe that we should gain some experience with the use of ranges before we establish them for all accounts. This measured step should yield sufficient information to allow us to later expand the use of ranges to other, perhaps all, accounts. We seek comment on this proposal. We also invite comment on criteria we should use to select the initial basic factor range accounts. Commenters should specifically list those accounts that would meet their proposed criteria.

17. Once accounts are selected and ranges are established for those accounts, we face the issue of whether we should make basic factor ranges mandatory for all carriers for all applicable accounts, or make the approach optional for all or some of the accounts. We tentatively conclude that this option should be mandatory for all carriers for all applicable accounts. We believe that this range option we propose would provide sufficient flexibility for carriers so that mandatory participation would be reasonable. We seek comment on this tentative conclusion. Commenters advocating use of an optional plan should explain how their approach would affect administrative costs savings that would result from mandatory participation.

18. If we mandate use of basic factor ranges, we seek comment on what action we should take for those carriers whose basic factors underlying their currently-prescribed depreciation rates do not fall within the ranges we select. We ask commenters to address whether we should move those carriers into the ranges initially, or phase them into the ranges over time. In addressing the phasing-in approach, commenters should propose a phase-in time table. We also invite comment on the appropriate standard for waiving the use of the basic factor ranges in those few instances when phasing-in may not be appropriate. We tentatively conclude that, because the basic factor ranges approach provides carriers with great flexibility, carriers should be required to show a significant divergence between their expected depreciation expense and that resulting from the use of ranges before a waiver is granted. We seek comment on this standard and alternatives.

19. Implementation also raises the issue of when to implement the ranges: should they be implemented for all carriers at one time or on a staggered basis. While a one-time conversion to basic factor ranges would be expedient, we question whether converting 35 carriers to a new depreciation process at once will produce such an administrative burden for carriers and regulators alike that we should mandate implementation of ranges on a staggered basis. One option would be to implement their use over a three year period, mandating use at the time a carrier is scheduled for its normal depreciation prescription. We seek comment on this issue.

20. Finally, we ask whether a carrier should be allowed to select any basic factor from within the established range, and how often that carrier should be allowed to change any selected basic factor within the range.[13] While we tentatively conclude that the ranges should afford carriers flexibility, they should not provide unreasonable incentives for carriers to make depreciation decisions on the basis of their effect on earnings.[14] Thus, we propose to allow carriers to select their initial basic factors on the basis of the basic factors underlying currently-prescribed depreciation rates plus a specified percentage of change.[15] We would also apply this proposal to any basic factor changes over time. We invite comment on these proposals. As for how often a carrier would be allowed to change its selected basic factors, we tentatively conclude that changes should occur, at most, on an annual basis. We invite comment on this tentative conclusion. We specifically ask commenters to address whether allowing basic factor changes within the established ranges prior to a scheduled depreciation review negates the administrative savings we seek by this simplification option. We also seek comment on whether basic factor changes within the range should be made consistent with our annual update process carriers may now use.[16]

2. Reviewing Established Ranges

21. Under our current depreciation process, we revisit each carriers' depreciation rates every three years. We have found that we must review these rates because the underlying basic factors, the projection life, survivor curve, and FNS, change over time. The changes are attributable to technological advances, customer demand changes, and competitive forces. We expect these changes to continue, and are therefore certain that we will need to revisit the basic factor ranges we may establish. However, we believe that the use of ranges will reduce the need to review basic factors from once every three years to, perhaps, once every five to ten years. We invite comment on this issue.

22. We also seek comment on what procedures and methods we should use to update the ranges established. We could complete a depreciation review on an industry-wide basis. This would require carriers to analyze accounting data and company plans as they now do, and to submit such analysis to us for establishing any new ranges.[17] We could further simplify this reviewing process by either reviewing data at the regional operating company level or by using a sampling method. We invite comment on these options and other alternatives. Commenters should specifically quantify the costs savings attributable to reviewing data on an aggregated level or by sampling.

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[13] We note, however, that the Commission, under §220(b) of the Communications Act, maintains final prescription authority.

[14] Again, we note that each carrier should continue to analyze the information necessary to determine the depreciation expense appropriate for that carrier.

[15] For example, we might establish a projection life range of 5-10 years for a specific account, and the percentage of change allowed might be 10%. If a carrier's projection life for that account was at 10, that carrier could select a projection life between 9 and 10 years.

[16] For further explanation of the annual update process, *see* The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended, for: American Telephone and Telegraph Company - Long Lines Department, *et al., Order*, 96 FCC 2d 257, 268 at paras. 32-34 (1983).

[17] We note that carriers would be required to maintain their continuing property records regardless of the reviewing process we ultimately adopt. Continuing property records, records of the companies' plant investment, are necessary for accurate accounting records.

3. Related Issues

a. Price Cap Treatment

23. Under price cap regulation, a depreciation expense change is treated as an endogenous cost.[18] That is, price cap rates do not change when depreciation expense changes, even if that change results from Commission-prescribed depreciation rates. The endogenous treatment is based on the carriers' control over their own construction plans;

> [w]hile we determine the rate of depreciation, we do not decide for carriers when to deploy new plant and when to retire old ... Accordingly, it is not this Commission, but the carrier, through its decisions on when to deploy and retire equipment, that primarily controls, the rate at which the plant investment is translated into depreciation expense.[19]

24. The basic factor range option would not affect the endogenous treatment of depreciation expense changes. Carriers would continue to have control over their depreciation rates and expenses under this option because, initially, the ranges would be determined from the basic factors underlying currently-prescribed depreciation rates. As noted above, these basic factors give great weight to the companies' future plant investment. Moreover, our proposals for future updating of the ranges also rely on analysis of actual plant retirement, allowing the ranges to reflect industry practice. We therefore tentatively conclude that carriers will control the ranges to approximately the same extent that they control the rate-setting process today, and that they further exercise control over the basic factors they select within the range, and thus depreciation rates.

b. Continued Use of Equal Life Group Procedures

25. The depreciation rates this Commission prescribes are based on a process that allocates the depreciation expense on a straight-line basis over the service life of plant. As we have previously explained,[20] in most accounts, we group assets by vintage and then by life expectancy within that vintage to determine the proper allocation of plant investment over the plant life. This grouping procedure is known as Equal Life Group (ELG). Assuming the estimated basic factors are accurate, this procedure allows the recovery of depreciation expense faster, but at a more accurate, straight-line rate than would result by merely grouping assets by vintage. The accuracy of the survivor curve is extremely important because ELG rates are very sensitive to the shape of that curve. Because ELG allows for faster, albeit more accurate, depreciation than prior methods used, the Commission has allowed the use of ELG rates only when the data necessary to determine the curve shape is available for a specific account of an individual carrier.[21] Since we propose to use industry-wide data to determine a range of curve shapes for accounts instead of account-specific data for individual carriers, we seek comment on whether this should affect our continued use of ELG.

B. The Depreciation Rate Range Option

26. Under this simplification option, the Commission would establish a range of depreciation rates for each applicable account. A carrier would continue to apply the rate to the plant account balance to calculate its depreciation expense. The primary difference between this option and the basic factor range option is that depreciation rates would be established without resorting to the formula we now use to determine depreciation rates. Thus, there might be some additional administrative costs savings. Also, by establishing rate ranges, carriers would have a degree of flexibility they have never had under our depreciation regulation. We seek comment on this option. We ask commenters to quantify the administrative costs savings from adoption of this approach.

1. Implementing the Depreciation Rate Range Option

27. We seek comment on how we should initially establish the ranges of depreciation rates. We tentatively conclude that industry-wide rate data should be the initial basis for determining rate ranges. We also tentatively conclude that ranges should be determined from a statistical analysis of currently-prescribed rates. For example, we might review the industry-wide data on Motor Vehicles, Account 2112.[22] In establishing the range, we might average the prescribed rates for that account and then allow a range of one standard deviation below the average to one standard deviation above the average. We invite comment on this conclusion, and request that commenters specifically address the appropriate width of these ranges.

28. This option raises many of the same issues outlined in our proposed basic factor range option. Thus, we set out below, the issues commenters should address:

a. Should we establish two sets of ranges: one for LECs and one for IXCs? We tentatively conclude that we should. *See supra* para. 15.

b. Should we establish rate ranges for all plant accounts? If not, what criteria should be used to select plant accounts for which we will set initial rate ranges? We tentatively conclude that we should not establish rate ranges for all plant accounts at this time. *See supra* para. 16.

c. Should we mandate the use of ranges for all applicable accounts and for all carriers? We tentatively conclude we should. *See supra* para. 17. Commenters should also address what action the Commission should take for those carriers whose current depreciation rates would fall outside the established ranges, as well as an appropriate waiver standard. *See supra* para. 18.

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[18] *See* Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6809 at paras. 182-187 (1990) (*LEC Price Cap Order*).

[19] *Id.* at para. 182.

[20] *See supra* n.5.

[21] *See* Amendment of Part 31 (Uniform System of Accounts for Class A and Class B Telephone Companies) so as to Permit Depreciable Property to be Placed in Groups Comprised of Units with Expected Equal Life for Depreciation under the Straight-Line Method, *Report and Order*, 83 FCC 2d 267, 283 at para. 57 (1980) (*ELG Depreciation Order*), *recon.*, 87 FCC 2d 916 (1981), *supplemental opinion*, 87 FCC 2d 1112 (1981).

[22] 47 C.F.R. § 32.2112

d. Should we implement ranges for all carriers at the same time? *See supra* para. 19.

e. Should we allow carriers to select any rate from within the established range?[23] How often should we allow carriers to change their rate within the range over time? We ask commenters to specifically address whether carriers should be allowed to change a depreciation rate by a specified percentage on an annual basis. *See supra* para. 20.

Commenters should specifically address the administrative costs savings associated with the use of a range of depreciation rates when appropriate. Commenters may offer their own proposals.

2. Reviewing Established Ranges

29. The review of a range of depreciation rates raises essentially the same questions as those posed in our discussion of the review of basic factor ranges. Thus, we set forth the issues that should be addressed in this section:

a. While we are certain that any range we establish must be reviewed in light of technological and customer demand changes, we ask whether we should review depreciation rate ranges on a less frequent basis than we now review individual company depreciation rates. We believe that review should occur, at most, on a five to ten year cycle. *See supra* para. 21.

b. What procedures and methods should the Commission use to update depreciation rate ranges? *See supra* para. 22. We invite comment on these issues.

3. Related Issues

a. Price Cap Treatment

30. As with the basic factor range option, we tentatively conclude that a depreciation rate range option will not affect the endogenous treatment accorded depreciation expense changes under price cap regulation. We base our tentative conclusion on the fact that the currently-prescribed depreciation rates incorporate companies' future investment plans, and these rates will be used to determine the range. Moreover, our proposals for updating the rate ranges will also incorporate the carriers' future investment plans. Thus, because carriers will retain control of future investment decisions, they will retain control over depreciation rate ranges, and they will further exercise control over the rate they select within the range. *See supra* paras. 23-24.

b. Accumulated Depreciation Imbalances

31. The depreciation rate formula we employ is a remaining-life formula because it incorporates both an accumulated depreciation and ARL for any particular account. This formula, which was adopted in 1981,[24] is an improvement over our prior rate formula because it effectively allows for the true-up of any accumulated depreciation imbalance caused by any past over or under depreciation accruals which resulted from prior over or under life and salvage estimates. Since the range rate option will not use the rate formula, it may not allow for the same true-up mechanism. Without this true-up mechanism, carriers could experience accumulated depreciation imbalances that could result in an inaccurate statement of their net book costs, and potentially in carriers not depreciating 100% of plant costs.

32. We seek comment on whether we can design a rate range approach that would incorporate a true-up mechanism. We acknowledge that designing such a mechanism under this approach may be difficult because it may be inappropriate to apply an industry-wide accumulated depreciation to specific companies. We invite comment on this issue. We specifically ask commenters to explain how we might design a true-up mechanism for this option, and how we might apply such a mechanism to individual companies.

C. The Depreciation Schedule Option

33. Under this option, the Commission would establish a depreciation schedule based on a Commission-specified average service life, retirement pattern and salvage value for each applicable plant account. The carriers would then apply the schedule for each account to their investment in that account by vintage. This option offers a greater degree of simplification than the range options and the greatest degree of depreciation expense certainty, but it also offers the greatest deviation from accuracy in matching allocation of costs with plant consumption. We seek comment on the benefits and disadvantages of this trade-off, including specific quantification of administrative costs savings resulting from this option. We also invite general comment on this proposal.

1. Implementing a Depreciation Schedule Option

34. We seek comment on how we would determine the appropriate service life, retirement pattern, and salvage value for each account. One possible option would be for the Commission to establish a schedule based upon an industry-wide average of the projection life, retirement patterns, and salvage value underlying currently-prescribed rates. We invite comment on these proposals and solicit other alternatives.

35. Again, many of the same issues raised in our two range options need to be addressed here:

a. Should we develop two sets of depreciation schedules: one for LECs and another for the IXCs? We tentatively conclude that we should. *See supra* para. 15.

b. Should we adopt depreciation schedules for all accounts for which we prescribe depreciation now? We tentatively conclude that we should not. We invite comment on the appropriate criteria to determine the accounts for which we should initially establish depreciation expense schedules. *See supra* para. 16.

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[23] We note, however, that this Commission, under § 220(b) of the Communications Act, maintains final prescription authority.

[24] *ELG Depreciation Order, supra* n.21.

c. Should we mandate participation by all carriers for all accounts? This approach affords less flexibility than the range options. Thus, we do not offer a tentative conclusion on this issue. In addressing this issue, commenters should also state the appropriate waiver standard. *See supra* para. 18.

d. Should we convert all carriers to depreciation schedules at the same time? *See supra* para. 19.

We invite comment on all of these issues. Where appropriate, commenters should address any costs savings.

36. This approach raises an additional issue of whether we should apply the schedule approach to the total plant account investment for all applicable accounts or limit this approach to new plant investment. These schedules would be designed to recover 100% of plant cost over the service life in a particular' account; however, some adjustments may be necessary to apply such schedules to embedded plant that already has been partially depreciated. Thus, we ask commenters to address whether applying this option on a going-forward basis only is preferable to applying it to all plant investment in any applicable account. We invite commenters to propose options that would address the transitional problems posed by embedded plant. For example, we could develop depreciation schedules for each vintage of embedded plant in a particular account, or we could aggregate all embedded plant in an account and determine a composite depreciation schedule for that embedded plant. We seek comment on these proposals, and also invite commenters to offer alternatives.

2. Reviewing Established Depreciation Schedules

37. We seek comment on whether, and how we should review the depreciation schedules. As we explained with the range options, we are certain that review is necessary. We invite comment on how often we should review, and the procedures and methods we should employ for reviewing. Commenters should also explain what data must be maintained to conduct a review.[25]

3. Related Issues

a. Price Cap Treatment

38. We tentatively conclude that the depreciation schedule option will not affect the endogenous treatment accorded depreciation expense changes under price cap regulation. Although we recognize that this option is less flexible than the range options proposed (because it would set one schedule for each account for all carriers), we nevertheless believe that service lives, retirement patterns, and salvage underlying currently-prescribed rates incorporate companies' future investment plans, and these rates will be used to set the schedules initially and in the future. Moreover, carriers that conclude that these schedules would not be appropriate could seek a waiver of their application.

b. Accumulated Depreciation Imbalances

39. As with the range of depreciation rates option, this option also raises the issue of accumulated depreciation imbalances because it will not employ the Commission's depreciation rate formula, a remaining life formula. However, because this option ultimately provides for 100% depreciation of the costs of plant, the potential for an imbalance is merely temporary, not permanent like that which could occur under the rate range option. Thus, we seek comment on whether this temporary imbalance is a problem.

D. The Price Cap Carrier Option

40. Over the past few years, price cap carriers have argued to this Commission that, in light of the endogenous treatment of depreciation expense changes, they should not be subject to the current depreciation prescription process. These carriers posit that, because a change in depreciation expense will not generally affect rates, detailed depreciation analysis is unnecessary. Accordingly, this option focuses on whether price cap carriers should be accorded greater flexibility in the depreciation prescription process as compared to carriers that remain subject to rate of return regulation. We note that under the LEC price cap scheme, LECs must share earnings with their customers if earnings fall within a specified sharing zone. We seek comment on whether the sharing mechanism will have any impact on LEC depreciation decisions.

41. Under this proposal, carriers would seek depreciation rate changes by filing with this Commission the following information: their depreciation rates in effect, their proposed depreciation rates, and the changes in depreciation expense that they would experience if the proposed rates became effective. Carriers would not be required to provide supporting data for their proposed depreciation rate changes. This option would essentially eliminate all of the steps the Commission now takes to analyze the carriers proposed depreciation rates. However, these proposed depreciation rate changes would continue to be placed on Public Notice. The proposed rate changes and the comments submitted in response to the Public Notice would be reviewed to ascertain the reasonableness of the proposed changes. Ultimately, we would prescribe rates based on carriers' proposals and the comments submitted thereon. Any state commission that would be concerned with a particular carrier's filing would be notified of that carrier's proposed depreciation rate changes and invited to comment on the filing at the same time the proposed changes are placed on Public Notice. We invite comment on this option. Commenters should quantify the costs savings resulting from this option. Commenters should also address whether this option is consistent with the Commission's statutory obligation to prescribe "percentages of depreciation which shall be charged" under Section 220(b).[26] We note that this approach also would eliminate issues of implementation and review raised by the other three options.

42. We also seek comment on whether this approach would be consistent with our Section 220(i) statutory requirement. Section 220(i) states:

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[25] We reemphasize here that we will continue to require the carriers to maintain their continuing property records, even if we adopt a depreciation schedule approach. Accurate information on assets of the company are important to accurate maintenance of books of account.

[26] 47 U.S.C. § 220(b).

> The Commission, before prescribing any requirements as to accounts, records, or memoranda, shall notify each state commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.[27]

It has been our practice in fulfilling this statutory requirement to have representatives from the Common Carrier Bureau, the state commissions, and the carriers to meet to discuss the various depreciation rate proposals put forth by the carriers, this Commission's staff, and any suggested by state commissions (*i.e.*, the three-way meeting). Under this option, three-way meetings would no longer occur. Instead, we would rely on formal comments filed by a state commission in the notice and comment process. We invite comment on whether this proposal satisfies the notification requirement of Section 220(i).

E. Additional Simplification: Salvage

43. The current depreciation process and the four simplification options we seek comment on include net salvage as a part of the depreciation process. In furtherance of simplification, we seek comment on whether we should, independent of those options, change our approach to salvage and not consider it in the depreciation process. This simplification option would require carriers to remove salvage from their depreciation process and require them to book the cost of removal and salvage as current period charges and credits. In addressing this proposal, commenters should quantify the effects this change would have on carriers' income statement and the administrative costs savings associated with the change. Also, we ask whether this changed treatment of salvage would be contrary to Generally Accepted Accounting Principles (GAAP).

IV. PROCEDURAL MATTERS

A. Ex Parte

44. This is a non-restricted notice and comment rulemaking proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.[28]

B. Regulatory Flexibility

45. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act.[29] Because of the nature of local exchange and access service, the Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not "small entities" as defined by that act.[30] The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of that act.[31]

C. Comment Dates

46. We invite comment on the proposals and tentative conclusions set forth above. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules,[32] interested parties may file comments on or before March 10, 1993, and reply comments on or before April 13, 1993. To file formally in this proceeding, interested parties must file an original and four copies of all comments, reply comments, and supporting comments. If interested parties want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Interested parties should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Downtown Copy Center, Room 640, 1990 M Street, N.W., Washington, D.C. 20036. We also ask that parties send a courtesy copy of their comments to the Accounting and Audits Division, 2000 L Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

V. ORDERING CLAUSE

47. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 4(j), 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 220(b), and 403, NOTICE IS HEREBY GIVEN of proposed amendments to Part 43.43 of the Commission's Rules, 47 C.F.R. § 43.43 as described in this Notice of Proposed Rulemaking.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[27] 47 U.S.C. § 220(i).
[28] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).
[29] 5 U.S.C. §601(3).
[30] *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983).
[31] 5 U.S.C. § 603(a).
[32] 47 C.F.R. §§ 1.415, 1.419.

Concurring Statement
of
Commissioner Ervin S. Duggan

In Re: Simplification of the Depreciation Prescription Process: Notice of Proposed Rulemaking

While I support the Commission's decision to seek comment on various proposals for streamlining the way we prescribe depreciation rates, I have serious reservations about the notice's fourth proposal. That proposal would, in effect, eliminate all review of price cap carriers' proposed depreciation rates. To underscore my concern about this scheme, I have chosen to concur in the issuance of this notice.

I support reasonable efforts to streamline our depreciation procedures--- so long as such streamlining does not undercut the effectiveness of the depreciation prescription process. Our current approach is to approve telephone company depreciation proposals so long as the proposed rates reflect the actual rate of plant retirement. Any streamlined approach should, in my judgment, maintain the goal of accurate prescription of telephone company depreciation.

The first streamlining proposal in the Notice--- to adopt ranges for the elements that constitute the depreciation formula--- appears to me the most reasonable, particularly because it would be limited to certain accounts. I am not closed, however, to other possible approaches, and so I encourage parties to comment with care on other alternatives we have set forth in the notice.

The fourth option set forth in the notice, however, is likely to find me in opposition at the end of this rulemaking. Under that option, price cap carriers would file proposed depreciation rates with no support whatever that would justify those rates. Although the public would be allowed to comment on those proposed rates, they would do so in a vacuum. Their views would be virtually meaningless, because the carriers would have filed no documentation to support their chosen rates. This option, in effect, would mean that the FCC would simply rubber-stamp the carriers' proposed depreciation rates: Regulation by robots.

Under Section 220(b) of the Communications Act, the FCC is obliged to prescribe the percentages of depreciation that will apply to carriers' property. There are good reasons for this statutorily required close look at depreciation:

* First, depreciation is the largest component of total telephone company expense. Even a small change in depreciation rates can add up to a large change in total expenses.

* Second, depreciation expense is not a measurable out-of-pocket cost. It is, rather, an estimate of the rate at which a capital asset loses its value over time. Because of the necessarily imprecise nature of such predictions about the useful life of an asset, depreciation is susceptible to overly optimistic treatment.

* Third, many states rely upon the FCC's depreciation prescriptions (even though they are not bound to do so); and the FCC benefits from their contributions to the process.

Even for carriers under price caps, prescribing accurate depreciation rates is essential. Changes in depreciation expense may not directly affect the price cap index, but such expenses can affect the price cap indirectly if the carriers are earning enough to be in the sharing zone, where they are obliged to share excess earnings with ratepayers through future reductions in the price caps. Carriers thus have the incentive even under price caps to manipulate depreciation expenses in order to avoid the sharing obligation. The sharing mechanism, in my judgment, is a key part of the consumer protections established under the price cap plan for local telephone companies--- and should not be undermined.

Finally, the Commission needs accurate measures of depreciation expense so it can monitor the progress of price caps. If expenses are not accurately measured, it will become more difficult to assess the real level of telephone company earnings under price caps. Without accurate information, we will not be in a position to prescribe any necessary changes in the price cap formula at the time of the four-year price cap review.

For these reasons, while I support reasonable proposals for streamlining our depreciation process, I cannot support a proposal that would weaken the FCC's role in that process and threaten, ultimately, the well-being of ratepayers.

# # # #

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Telephone Companies Transmittal No. 132

Tariff F.C.C. No. 1

ORDER

Adopted: December 30, 1992; Released: December 30, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On November 5, 1992 the NYNEX Telephone Companies (NYNEX) filed the captioned tariff revisions which are scheduled to become effective January 4, 1993 on 60 days' notice. This filing introduces regulations to eliminate shared use arrangements with Optical Fiber Interface Option 2 (OFIO 2) for 44.736 Mbps High Capacity Service.

2. On November 20, 1992 Sprint Communications Company LP (Sprint) filed a petition to reject or suspend and investigate Transmittal No. 132. Sprint argues that NYNEX is not required to make the captioned tariff filing. On December 3, 1992 NYNEX filed an opposition to Sprint's petition.

3. The Common Carrier Bureau has reviewed NYNEX Transmittal No. 132 and the pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 132, filed by Sprint Communications Company LP IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Tri-State
Inspirational
Broadcasting Corporation, Inc.,
Licensee of Station WBHL(FM)
Florence, Alabama

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1992; Released: January 5, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a Notice of Apparent Liability (NAL) issued on August 4, 1992, for five thousand dollars ($5,000) against Tri-State Inspirational Broadcasting, Corporation, Inc., ("Tri-State"), licensee of Station WBHL(FM), Florence, Alabama, and (2) a Petition for Reconsideration and Reduction or Remission of the Notice of Apparent Liability, submitted on August 31, 1992.

2. The Bureau issued the Notice of Apparent Liability for broadcasting 10 announcements on March 20 and 21, 1991, which apparently violated Section 399B of the Communications Act of 1934, as amended, and related rules and policies governing donor and underwriting announcements. Section 399B prohibits noncommercial stations from broadcasting announcements that promote the sale of goods and services of for-profit entities in exchange for remuneration. Thus, contributors of funds may receive on-air acknowledgement for identification purposes only. As explained more fully in the NAL, the 10 announcements contained comparative and qualitative descriptions, which exceeded the identification-only purpose of underwriting acknowledgments.

3. In the Petition for Reconsideration, Tri-State requests a remission or a reduction of the forfeiture. First, it asserts that the good faith judgment of the non-commercial broadcaster should override objective standards. Second, it contends that its financial inability to pay the forfeiture should result in a reduction. In support, it submits a financial statement.

4. With respect to the first argument, while good faith may affect the amount of a forfeiture, *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), it does not excuse a violation.

5. We also cannot accept Tri-State's financial statement as indicative of its financial condition or ability to pay the fine. For a licensee to obtain mitigation of a forfeiture based on financial inability to pay the fine, it must submit a profit and loss statement prepared under generally accepted accounting principles. The documents submitted by Tri-State have not been prepared under generally accepted accounting principles. These documents merely represent the assertions of Tri-State management and have not been audited, merely reviewed by an accounting firm. Additionally, because Tri-State is 100% owned by International Bible College ("IBC"), and IBC is pervasively involved in Tri-State's finances, an accurate picture of Tri-State's ability to pay the forfeiture would include a profit and loss statement from IBC, which was not submitted.

6. We have reviewed the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended, and conclude that the amount of forfeiture assessed against Tri-State in this proceeding is justified.

7. Pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Tri-State Broadcasting Corporation, Inc., licensee of Radio Station WBHL(FM), Florence AL, FORFEIT to the United States five thousand dollars ($5,000) for its repeated violations of Section 399B of the Communications Act of 1934, as amended, and related rules and policies governing donor and underwriting announcements by airing 10 announcements on March 20 and 21, 1991. Payment of the forfeiture may be made by following the instructions on the enclosed form. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Global Broadcasting Group, Inc. — File No. BMPHI-850109IF

Interim Operator,
Station WNWK(FM)
Channel 290, Newark, New Jersey

Multicultural Broadcasting, Inc. — File No. BPH-920723IB

For modification of permanent FM facilities to operate on Channel 290 at Newark, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: August 18, 1992; Released: August 18, 1992

By the Commission:

1. The Commission has under consideration a "Petition for Stay" filed on August 17, 1992 by Global Broadcasting Group, Inc. ("Global"), the interim operator of Station WNWK(FM), Newark, New Jersey. Previously, the Mass Media Bureau staff, pursuant to delegated authority, directed Global to cease its interim operations effective August 19, 1992, at 11:59 P.M., and authorized Multicultural Broadcasting, Inc., the permanent permittee, to begin its previously-authorized permanent operations on Channel 290 at Newark, effective August 20, 1992, at 12:01 A.M. *Letters from Chief, Audio Services Division to Margot Polivy, Esquire, and Michael J. Wilhelm, Esquire*, Ref. 1800B3-CJI, dated August 11, 1992, and Ref. 8900-LDE, dated August 12, 1992. Global now requests a stay of the effectiveness of that letter order, pending Commission action on its application for review, also filed on August 17, 1992.[1]

2. We shall deny Global's petition for stay because it has failed to demonstrate that it satisfies the four-prong test that: (1) petitioner is likely to prevail on the merits; (2) it will be irreparably injured; (3) other parties to the proceeding will not be substantially harmed by issuance of a stay; and (4) the public interest will be better served by grant of a stay. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) ("*WMATC*"); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). Initially, we note that the D.C. Circuit has already denied the request for stay filed by Global on August 11, 1992, on the basis that "Global has not demonstrated the requisite likelihood of success on the merits to warrant the extraordinary relief requested." *Global Broadcasting Group, Inc. v. FCC*, D.C. Cir. No. 92-1354 (August 13, 1992). Because this matter involves who will be entitled to operate on Channel 290 while we consider Global's application for review, the critical question for us is "the balance of equities as revealed through an examination of the [irreparable harm and public interest] factors." *WMATC*, 559 F.2d at 844. While we shall assume *arguendo* that Global may be irreparably injured, we find that Multicultural will suffer substantial harm if it is delayed from beginning operations on its duly-authorized facility. Moreover, we find that the public interest would be better served by allowing Multicultural to begin to serve the public on a permanent basis than by continuing service by Global, whose authorization by its very terms is at sufferance. As Global is aware, its authorization has always been conditioned to expire when the permanent operator is selected and ready to commence operations. On July 30, 1992, Multicultural notified Global and the Commission that it was ready to commence operation.

3. ACCORDINGLY, IT IS ORDERED, That the "Petition for Stay" filed on August 17, 1992 by Global Broadcasting Group, Inc. IS DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] The application for review filed by Global is directed at the staff's grant of the above-captioned application by Multicultural for a minor modification to its previously-authorized facilities.

[2] For similar reasons, the informal request for stay filed on August 10, 1992 by the Committee to Preserve Multi-Lingual and Multi-Ethnic Programming, addressed to the Assistant Chief, Audio Services Division, is hereby denied. That request expresses concern that "Global's unique foreign language programming [will be] discontinued."

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CORONADO COMMUNICATIONS COMPANY
(Assignor)

and File No. BALCT-920723KF

KGSW-TV, INC.
(Assignee)

For Assignment of KKTO-TV
Santa Fe, New Mexico

KGSW-TV, INC. File No. BPCT-920723KG

For Minor Modification
of Facilities of KKTO-TV
Santa Fe, New Mexico

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 1992; Released: December 22, 1992

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it for consideration an application for consent to assign the license of television station KKTO-TV, Channel 2 (Ind.), Santa Fe, New Mexico, from Coronado Communications Company (Coronado) to KGSW-TV, Inc. (KGSW), the licensee of KGSW-TV, Channel 14 (Fox), Albuquerque, New Mexico. Concurrently, KGSW filed, contingent upon our grant of the assignment application, an application for modification of the facilities of Channel 2. KGSW proposes to surrender the license for Channel 14 upon the consummation of the assignment and implementation of the modifications. However, in the event that there is a delay between consummation and implementation, and because the Grade B contours of KKTO-TV and KGSW-TV overlap, KGSW also seeks a contingent request for temporary waiver of Section 73.3555(a)(3)[1] during the transition period. KOB-TV, Inc. (KOB), licensee of television station KOB-TV, Channel 4 (NBC), Albuquerque, filed a petition to deny both applications. KGSW and Coronado filed separate Oppositions, and KOB responded with a consolidated reply.

BACKGROUND

2. In May 1988, Coronado, a wholly owned subsidiary of Sunbelt Broadcasting Company, acquired KKTO-TV out of bankruptcy for $3 million, and, according to Coronado President and Chairman James Rogers, invested $1.4 million in the construction of new studio facilities for the newly acquired station. In addition to the one other television station licensed to Santa Fe, also an independent, Rogers asserts that KKTO-TV competes with 14 Albuquerque market stations, including those affiliated with ABC, CBS, NBC, Fox and Univision. Santa Fe is included in the Albuquerque area of dominant influence (ADI), the 52nd largest television market. As a result of the competition in this market, according to Rogers, from 1988 through July 1992, Coronado sustained net losses totalling more than $6.6 million. "The situation," Rogers notes in a mid-July 1992 declaration submitted with the modification application, "has worsened to the point that it is no longer economically feasible for [Coronado] to continue Station KKTO-TV's service in the future." In July 1992, Coronado and KGSW, wholly owned by Providence Journal Broadcasting Corp., which, in turn, is wholly owned by Providence Journal Company, entered into a purchase and sale agreement, providing for the payment of $650,000 for the station and assets, and a separate real estate sales agreement.[2] Prior to, or upon, consummation of the assignment, according to KGSW, KKTO-TV will cease its operations[3] and, following Commission consent, will modify the Channel 2 facility by moving the transmitter site from a location approximately 30 miles west of Santa Fe to Sandia Crest, a peak approximately 43 miles southwest of Santa Fe and 14 miles northeast of Albuquerque. Rising nearly two miles above sea level, Sandia Crest is the current location of KGSW-TV's transmitter, as well as those of all other stations licensed to Albuquerque. The modified Channel 2 will operate at an effective radiated power (ERP) of 28.2 kW with a tower height 1,275 meters above average terrain (HAAT). Upon implementation of this modification, KGSW-TV will then shift its programming service to Channel 2, and KGSW would surrender its Channel 14 license. This modified facility, according to KGSW, would not only preserve Channel 2 as a second local outlet for Santa Fe, but would extend KGSW-TV's program service to an additional 51,141 persons in an area of 16,705 square kilometers (6,450 square miles). Although this chronology of

[1] Section 73.3555(a)(3) generally prohibits common ownership of television stations whose Grade B contours overlap.

[2] In the real estate agreement, Silver State Properties, Inc., a subsidiary of Sunbelt, agrees to sell separately to KGSW two buildings and the land upon which they are situated, one in Santa Fe and one in Albuquerque, and used in connection with Coronado's operation of KKTO-TV. KOB contends that the applicants should disclose the purchase price for this real property, as well as submit all schedules and attachments to the separately executed purchase and sale agreement. Although the staff does require disclosure of the purchase price of the station and associated assets, it does not require such information in the case of a separate real property agreement. And, even though the staff has the authority to require submission of schedules and attachments to purchase and sales agreements, receipt of that information was deemed unnecessary to the staff's determination in this proceeding. *Univision Holdings, Inc.*, 7 F.C.C. Rcd 6672, 6675 (1992), *recon. pending on other grounds*.

[3] On September 6, 1992, KKTO-TV temporarily discontinued operations, "with the expectation," according to Rogers, "that Channel 2's operations would be restored by the sale to KGSW-TV, Inc."

events, KGSW states, avoids violation of the duopoly rule, KGSW submits a contingent request for temporary waiver of that rule, in the event there is a delay between consummation of the assignment and the grant and implementation of the modification.

3. KOB, in its petition to deny the assignment and modification applications, contends that notwithstanding the request of the applicants, the assignment application can be processed and granted only if the modification application is granted. And, KOB argues, the modification application fails on two primary grounds: (1) it does not comply with the Commission's technical rules with regard to city-grade coverage; (2) it contravenes Section 307(b) of the Act with its resulting loss of service and with its subversion of the Commission's Table of Allotments.[4] Consequently, KOB asserts, both applications should be denied or set for hearing.

PROCEDURAL MATTERS

Contingent Applications

4. The applicants' purchase and sale agreement does not make contingent upon grant of the modification application the sale of KKTO. Indeed, Coronado urges us to first process and grant the assignment application, and then address the modification application. However, KOB counters that the modification application presents substantial and material questions of fact which must be resolved in a hearing, possibly lasting "a very lengthy period." Thus, KOB argues, if the modification application is contingent upon grant of the assignment application, as the applicants maintain, there exists the possibility, if the assignment is granted here and the modification is not, that KGSW would own both KKTO-TV and KGSW-TV for a period exceeding the "brief transition period" contemplated in KGSW's contingent request for a temporary waiver. Therefore, according to KOB, the assignment application can be processed and granted only if the modification is granted. Section 73.3517(a) specifically permits the filing of modification applications contingent upon the grant of an assignment or transfer applications. The staff routinely coordinates the processing of such applications, as may be appropriate in the circumstances presented. *E.g., Selma Television, Inc.*, 29 F.C.C. 2d 522, 524-25 (1971), *aff'd sub nom. WCOV, Inc. v. FCC*, 464 F.2d 812, 814-15 (D.C. Cir. 1972). Because the modification application is an essential part of the transaction before us, we shall first consider the modification application and, if we find a grant is warranted, shall then consider the assignment application.[5]

Standing

5. Coronado contends that KOB lacks standing with respect to the assignment application. We note that Coronado President and Chairman Rogers links KKTO's financial hardship to the competition from Albuquerque-based network affiliates, and that Channel 2 as authorized competes with Albuquerque-licensed stations, including KOB, an NBC affiliate. Accordingly, based on *F.C.C. v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), KOB has standing to petition to deny the assignment application. Because, as discussed above, we are considering the assignment and modification applications in tandem, KOB also is able to establish standing based upon its competitive status with a modified Channel 2. In contrast, petitions to deny do not lie against a minor modification, 47 U.S.C. §73.3584, such as the one here. We shall, therefore, consider, as KGSW suggests, the portions of KOB's petition pertaining to the modification as an informal objection under Section 73.3587 of the Commission's Rules. *See Tele-Visual Corp.*, 33 F.C.C. 2d 418 (1972).

SUBSTANTIVE ISSUES

City-Grade Coverage

6. A modified Channel 2 must provide a city-grade signal of 74 dBu over all of Santa Fe, its city of license, as required by Section 73.685(a) of the Commission's Rules. Although KGSW concedes that the proposed city-grade contour, as determined by the Commission's standard prediction method detailed in Section 73.684, does not encompass all of Santa Fe, it contends that the requisite coverage is demonstrated by field strength measurements, an alternative showing it argues is permitted by Section 73.684(f). That section allows a supplemental showing, as determined "by other means," to be submitted where the terrain in the general direction from the antenna site "departs widely from the average elevation of the 3.2 to 16.1 kilometers (2 to 10 mile) sector" used in the prediction method. Here, KGSW notes, the topography extends from the two-mile high peak of Sandia Crest, falls rapidly to terrain about one mile in elevation, then generally levels off and rises gradually again toward Santa Fe. Because this terrain, KGSW argues, "departs widely" from the Commission prediction model, submission of a supplemental showing is justified. And, KGSW maintains, a showing based on field strength measurements is appropriate here, where the location of the city-grade contour for a modified Channel 2, as determined by prediction, is in gross error. The measurements, according to KGSW, were obtained in accord with the field strength measurement guidelines of Section 73.686 and were based on the field strengths in Santa Fe of KOB-TV, Channel 4, and KNME-TV, Channel 5, both full-facility, low-band, Albuquerque VHF stations colocated atop Sandia Crest with the proposed Channel 2. The average of the Channel 4 and Channel 5 median field strengths at Santa Fe, KGSW concluded, was 79.4 dBu, or approximately 10 dB greater than the predicted level of 69.5 dBu, 5.4 dBu above the required city-grade signal of 74 dBu.[6] Thus, KGSW notes, the magnitude of the difference amounts to

[4] KOB also notes in its petition that KGSW failed to submit in its application complete RF radiation hazard calculations required for a transmitter site like Sandia Crest, which is a multiple use site. Those calculations have since been submitted and satisfy our requirements.

[5] While KGSW seeks action on the applications by the staff, under delegated authority, KOB challenges that authority. Because, KOB argues, the issues raised with regard to the city-grade coverage are novel questions of fact, law, and policy, they cannot be resolved under outstanding precedents and guidelines. Although KOB's concerns, if true, would require reference of this case to the Commission, pursuant to Section 0.283, resolution of the issues in this case, both legal and technical, are rooted in Commission precedent. Therefore, the staff is able to act upon these applications.

[6] Additionally, KGSW asserts that the nonconforming terrain, which allows for direct line of sight from Sandia Crest to Santa Fe, makes the free-space propagation the most appropriate

the "gross error" that *Field Strength Curves*, 53 F.C.C. 2d 855, 869 (1975), requires for a supplemental showing based on field strength measurements.

7. In opposition, KOB concedes that the elevation of most of the radial between Sandia Crest and Santa Fe is lower than the two-to-ten mile terrain average of the Commission's predicted method, thereby justifying a supplemental showing. However, KOB argues, the field strength measurement procedure does not qualify as the "other means" referred to in Section 73.684(f) as the basis for such a showing. The determination of contour distances by field strength measurements, KOB asserts, relying on *Field Strength Curves* and the rule it amended, Section 73.686, is permitted only in rule making proceedings and in situations where the contours, as determined by prediction, are obviously in "gross error" and then, only upon Commission request. However, here, KOB contends, not only do the lower elevations not result in gross error,[7] but the Commission never requested a field strength measurement of KGSW. Moreover, the field study, according to KOB, is unreliable in two ways. First, the measurements were based on the field strengths of Channels 4 and Channel 5, yielding insufficient assurances that a modified Channel 2's city-grade contour would encompass Santa Fe. Second, because field strength measurements vary over time, as well as with weather changes, KGSW's four-day study produced inaccurate results.[8] In sum, KOB contends, KGSW's failure to demonstrate predicted city-grade coverage, to submit a supplemental showing based on a sanctioned method, and to submit sound field strength measurements create a substantial and material question of fact as to whether all of Santa Fe would receive a city-grade signal from a Channel 2 transmitting from Sandia Crest.

8. As KOB correctly notes, Section 73.684(f) does not specify the "other means" by which a supplemental showing on coverage may be made. Contrary to KOB's contention, however, the Commission has neither limited the use of field strength measurements to rule making proceedings nor rejected them as the basis for a Section 73.684(f) supplemental showing. Indeed, in revising Section 73.686, the rule regarding field strength measurements, the Commission observed that "[o]ccasionally, there may be instances when the location of TV contours, as determined by prediction, are obviously in gross error, and measurements will produce a result which, by any standard, is more realistic." *Field Strength Curves*, 53 F.C.C. 2d at 869. And, when such cases are brought to our attention, "measurements may be accepted when made on an individual basis 'upon the request of the Commission.'" *Id.* Thus, the Commission established a two-part prerequisite for applicants submitting field strength measurements as a supplemental showing. *See Son Broadcasting, Inc.*, 79 F.C.C. 2d 598, 600 (1980). The rationale for this preliminary showing, to restrict the submission of field measurements, was not based "primarily on technical considerations," but in the interest of administrative speed, efficiency, simplicity, and finality. *Id.* at 868.

9. Here, we note, and KOB agrees, that the terrain between Sandia Crest and Santa Fe satisfies the threshold requirement for submitting a supplemental showing. Further, we find, in light of the Commission's rationale in establishing the dual criteria of Section 73.686, that KGSW has justified its submission of field strength measurements as a supplemental showing. First, even if we accept the 4.4 dB "best case" error calculated by KOB, it is reasonable to conclude that the median field strength in Santa Fe, as determined by prediction, is in error. Second, KGSW has submitted its showing by "other means," which is crucial to our public interest finding. Action on our part now to request formally the material which is already on file would exalt form over substance. We believe that a waiver of the "request" requirement is clearly consistent with the public interest. Accordingly, we shall consider KGSW's showing.[9] Thus, we must now determine whether a modified Channel 2 would provide a city-grade signal to Santa Fe. First, we note that KOB at no point provides data to support a signal level below the required 74 dBu. We find, despite KOB's two-pronged attack on KGSW's field study, that the field strength measurements are reliable. The measurements based on Channels 4 and 5 reflect a field strength signal exceeding the required 74 dBu by a margin great enough to assure that the signal from Channel 2 will also exceed or at least meet that required level.[10] And, although KGSW's four-day study in 1991 may not have included all time and climate variables, a Channel 4 field study in 1977 or 1978 resulted in a field strength signal of 75.2 dBu, still 1.2 dB above the minimum. Moreover, the Commission's engineers have confirmed, employing ter-

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model for this case. Employing this model, KGSW determined that the predicted free-space field strength for Albuquerque's KNME-TV, Channel 5, at the center of Santa Fe is approximately 84 dBu, or almost 14 dB above the predicted level of 69.5 dBu. Thus, KGSW asserts, this method also yields results that demonstrate gross error in the Commission's predicted level.

[7] KOB explores various accepted ways of establishing antenna height and considers other adjustments to prediction, such as the terrain roughness factor, and concludes that the "best case" field strength is 74.9 dBu. The maximum "error," therefore, according to KOB, based on a predicted level of 70.5 dBu, is only 4.4 dB. This small error, KOB asserts, does not constitute the "gross error" required for a supplemental showing based upon field strength measurements.

[8] Relying on the proposition that Albuquerque to Santa Fe is a line-of-sight path, KGSW contends that long-term and short-term fading is essentially negligible. Therefore, KGSW argues, field strength does not vary over time, and KGSW's four-day field measurements reflect the actual signal level at Santa Fe.

[9] Consequently, KOB's reliance upon *Son Broadcasting, Inc.*, 79 F.C.C. 2d 598 (1980), in which the Commission designated for hearing the nonmutually exclusive applications for new stations on Channel 2 and Channel 11 at Santa Fe and proposing to transmit from Sandia Crest, is unfounded. Unlike the applicants in *Son Broadcasting*, KGSW, as discussed above, meets the dual criteria for making a Section 73.684(f) showing based upon field strength measurements.

[10] KOB argues that because a free-space model is not appropriate for either Channel 2 or Channel 4, field strength can be lower on Channel 2 than on Channel 4. At the lower frequency, KOB asserts, there is more cancellation than on the higher frequency. Evidence of the lower field strength for lower channel numbers are present in KGSW's data, KOB asserts, which indicate slightly higher fields on Channel 5 than on Channel 4. Although lower frequencies tend to propagate better than higher frequencies, KGSW's measurements indicate that the median field strength in Santa Fe for Channel 5 is about 1 dB higher than that of Channel 4, or approximately 78.9 dBu. The reasonable conclusion, therefore, is that even if Channel 2's propagation is lower than that of Channel 4, it would still exceed the required 74 dBu.

rain-sensitive prediction techniques while allowing for losses due to local terrain and clutter, that the median predicted signal level for Channel 2 in Santa Fe is in excess of 74 dBu, similar to the measured levels resulting from KGSW's field study for Channels 4 and 5.[11]

Loss of Service

10. KOB asserts that not only will Channel 14 be eliminated entirely if the applications are granted, depriving 758,386 persons in an area of 42,421 square kilometers (16,380 square miles) of that Grade B signal, but the modified Channel 2 will create a service loss area. The loss of service from a modified Channel 2, totalling 12,475 persons in an area of 10,885 square kilometers (4,203 square miles), includes a new "white" area of 6,242 persons within 3,017 square kilometers (1,165 square miles) and a new "gray" area of 5,849 persons within 7,536 square kilometers (2,910 square miles).[12] The remainder of the loss area, containing 384 persons in an area of 332 square kilometers (128 square miles), has two or more other existing television services available.[13] And any offsetting service gains of a modified Channel 2 over the existing Channel 2, estimated by KOB to include 14,481 persons in an area of 14,745 square kilometers (23,783 square miles), are, KOB maintains, diminished by the current availability in the majority of that potential service gain area of five or more existing television signals. Nor, KOB contends, will the modified Channel 2 provide service to any existing white or gray areas. Consequently, KOB asserts, KGSW fails to demonstrate that the benefits of its proposal outweigh the "tremendous loss" of service that would occur.

11. Although any loss of service is *prima facie* inconsistent with the public interest, it is our policy to consider and evaluate any counterbalancing factors an applicant may present to justify service losses. *Hall v. FCC*, 237 F.2d 567, 572 (D.C. Cir. 1956). This balancing process, to determine whether the projected loss of service will be outweighed by other factors, involves more than a mere comparison of numbers. *West Michigan Telecasters, Inc.*, 22 F.C.C. 2d 943, *recon. denied*, 26 F.C.C. 2d 668 (1970), *aff'd*, 460 F.2d 883 (D.C. Cir. 1972).

12. In this case, there are several factors relevant to our analysis of whether grant of the applications will serve the public interest. First, the current Channel 2 has been dark since September 6, 1992, as a result of "severe and continuing financial losses sustained over a period of several years," according to Coronado.[14] This pattern of economic losses over the past four years, totaling more than $6.6 million, is consistent with the station's history: KKTO-TV was bankrupt when Coronado purchased it in 1988. We are persuaded by the applicants' assertions that a financially failing independent Santa Fe television station, like KKTO-TV, transmitting from near Santa Fe and located in the Albuquerque ADI, 52nd largest in the nation and comprising 14 other television stations, is unable to compete for advertising revenues. A modified, more competitive Channel 2, however, offers the possibility of economic viability for the station, one of only two licensed to Santa Fe. Moreover, Channel 2 will continue, as pledged by KGSW, to transmit news and local affairs programs responsive to the needs of Santa Fe and to maintain a studio in that community.

13. Second, although the Channel 14 signal will no longer be available, KGSW-TV's programming will not only remain, but will extend, via a modified Channel 2, to 51,141 additional persons in an area of 10,305 square kilometers (6,405 square miles). Furthermore, Santa Fe will receive, for the first time, a city-grade signal from a Fox affiliate, while no person or geographic area will lose KGSW-TV's programming. And, although shifting the Channel 14 programming to a modified Channel 2 will result in a loss of the existing Channel 2 signal to 12,475 persons within 10,885 square kilometers (4,203 square miles), engineering data supplied by KGSW demonstrates that the loss is largely theoretical: because more than 90 percent of that area is located in a shadowed area, most of the homes in the loss area have never been able to receive a usable Channel 2 signal.[15] Indeed, the sparsely populated

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[11] Although the Commission engineers found that the proposed Channel 2 antenna location on Sandia Crest would provide a line-of-sight propagation path to most areas in Santa Fe, it is, as the Commission has emphasized, "inherent in the statistical nature of predicting television signal propagation that some locations will have greater, and some lesser, field strengths than the designated median." *Sarkes Tarzian, Inc.*, 6 F.C.C. Rcd 2465, 2467 (1991). Thus, Section 73.685(a) states that the minimum field strength of 74 dBu must be provided over the entire city of Santa Fe, but Section 73.684(c) indicates that such predictions are to be based on a median field strength, utilizing F (50,50) charts. *Id.* at 2468 n.6. Those charts estimate the field strength expected at 50 percent of the locations for 50 percent of the time, or the median field strength. Therefore, the signal from a modified Channel 2 meets the required median signal level.

[12] A white area is one that is encompassed by no predicted Grade B television signal, while a gray area is encompassed by the predicted Grade B contour of only one television signal. In addition, we note that the figures cited are from KGSW's revised engineering data, which reflect slightly higher numbers than those of KOB.

[13] The loss area figures, derived from KGSW's Opposition, are slightly higher than those estimated by KOB, which calculated a total loss area of 12,007 persons within 10,749 square kilometers (6,664 square miles). Although the figures for white and gray areas also differ, the discrepancies are minor. Using the area and population figures least advantageous to the applicant does not affect the outcome here.

[14] KOB contends that Coronado has failed to comply with Section 73.1440, which requires that licensees which cease operation demonstrate that "causes beyond [their] control" make it impossible to continue operation. Yet, Coronado stated in its September 6, 1992 letter to the Commission that it had gone dark due to severe and continuing financial losses, an acceptable justification under Section 73.1740(a)(4). And, Coronado's reporting of this discontinued service, two days after the event, is well within the 10-day period mandated by Section 73.1740(a)(4). Moreover, because Coronado is unable to recommence operations within 30 days, it submitted a written request, on October 6, 1992, seeking permission to remain off the air until the Commission takes action on the assignment application before us. Accordingly, Coronado has fully complied with the requirements of Section 73.1740.

[15] KOB generally attempts to refute KGSW's shadowing data, labeling it as "simplistic" and contending that it does not include the effect of diffraction of signals over terrain. Because KOB has failed to attack KGSW's data with specificity, or counter with its own shadow study, we will rely on KGSW's data, derived from an independent engineering study, which appears reasonable upon our review.

loss area, which includes only one community recognized by the U.S. Census Bureau, contains only 26 villages, according to KGSW, 23 of which lie in the shadowed area. At least six of these 23 villages, KGSW discovered, enjoy the service of translators and/or cable systems, alternative forms of service which justify excluding the recipients of such service in calculating loss areas. *KTVO, Inc.*, 57 R.R. 2d 648, 650 (1984).[16] And, based on a field survey of viewers by KGSW,[17] the remaining three villages, those not lying in the shadowed area, are able to receive signals of some Albuquerque stations, raising the possibility that these villages may also be able to receive the signal of a Channel 2 transmitting from Sandia Crest. As for KKTO-TV's service, while it is true that its programming will cease if the applications are granted, we are also cognizant that not only has the station gone dark, but that our denial here would not necessarily revive that programming. In sum, we are presented with a situation in which the current Channel 14 will gain rather than lose viewership upon its shifting to a modified Channel 2, and in which the current Channel 2, whose licensee acquired the station out of bankruptcy, is now not operating because of financial losses. Although the modification of Channel 2 will result in a loss of service, that loss is theoretical in view of the station's nonoperational status and the likelihood that it may remain indefinitely dark. Our choice, then, is to deny these applications based upon theoretical losses or to grant them and permit a viable Channel 2 to operate in its stead. In view of all these factors, we believe, on balance, that the proposed modification would serve the public interest.

Subversion of the Commission's Television Table of Allotments

14. The Table of Allotments was established and incorporated in the Commission's rules to effectuate the objectives of Section 307(b) of the Act: to distribute broadcast services fairly, efficiently, and equitably. *Sixth Report and Order on Television Allocations*, 41 F.C.C. 148, 151 (1952). These tables provide for a distribution of channels in each service to specific communities throughout the United States. However, fearing that an applicant might seek to utilize a frequency in a community of license proximate to a larger community with a larger economic base, the Commission created several policies in order to ascertain which community an applicant actually intended to serve. *See Berwick Broadcasting Corp.*, 20 F.C.C. 2d 393 (1969); *Hall Broadcasting Co., Inc.*, 71 F.C.C. 2d 235 (1970)(*de facto* reallocation). Those policies were replaced, in 1983, by a presumption that the applicant intends to serve the community designated so long as it complies with three criteria: provision of a city-grade signal to the community of license; location of the main studio within the city-grade contour;[18] and proposal of programming to serve the designated community. *Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, 93 F.C.C. 2d 436, 456 (1983)(*Report and Order*), *recon. denied*, 56 R.R. 2d 835 (1984).

15. For the reasons stated above, we have found that KGSW satisfies the first criterion, city-grade coverage of Santa Fe. With regard to the main studio's location, the second criterion addressed in the presumption, KOB asserts that it "is also apparent" from the assignment application that only Channel 2 studio "offices" will be maintained at Santa Fe, not the station's main studio. And, KOB contends, although the main studio rule has been expanded to allow location of the studio anywhere within Channel 2's city-grade contour, the Commission should, under the circumstances here, "recognize that residents of Santa Fe are unlikely and maybe unable to travel 60 sparsely populated miles to Albuquerque to visit the main studio of what was supposed to be 'their' community's television station." As to KGSW's provision of responsive programming to Santa Fe, the third criterion, KOB maintains that the KGSW proposal "is simply a continuation of its (Albuquerque-oriented) programming," as acknowledged by KGSW in its modification application, in which it states that it will shift its programming service to Channel 2. Even if the modified Channel 2 satisfies the three criteria, according to KOB, the Commission should not ignore KGSW's "expressed intent" to substitute Channel 2 for Channel 14. Consequently, KGSW concludes, the KGSW proposal is a subversion of the television Table of Allotments.

16. KGSW, on the other hand, asserts that its intention to serve Santa Fe is evidenced by its compliance with the first criterion, city-grade coverage of that community, as well with the second and third. First, KGSW states that it is acquiring the Channel 2 studio in Santa Fe and "commits to maintain KKTO's presence in Santa Fe" by providing full-time management and support staff at the studio, by producing and transmitting programming from that location, and by maintaining a public inspection file there. And, second, KGSW represents, it will "provide programming responsive to the needs of Santa Fe," presenting news, public affairs and other matters of local interest, an enhancement of the service once furnished by the now-dark KKTO.

17. We find that a modified Channel 2 satisfies the two remaining criteria needed to qualify for the presumption that KGSW intends to serve Santa Fe. KGSW will, it states, maintain a studio in Santa Fe as well as in Albuquerque, both within the permissible city-grade contour. Further KGSW assures the Commission that it will attend to the

[16] Because KGSW indicated as receiving translator service only those communities to which the translator is licensed, it is possible that more than six villages receive the signal of translators. For example, KGSW notes that in Ranchos de Taos, viewers receive service from the many translators licensed to nearby Taos.

[17] KOB argues that KGSW's field survey should be rejected as "self-serving statements" in that no information is provided regarding the number and location of people interviewed, the identity of persons conducting such interviews, the questions asked, or any other information that would substantiate the results of that survey. In the past, however, we have accepted an applicant's field data as appropriate, especially where the petitioner has made no attempt to demonstrate the inaccuracy of the results. *WSET, Incorporated*, 80 F.C.C. 2d 233, 245 (1980). Nevertheless, we rely on KGSW's survey with regard to only the orientation of the three villages to Albuquerque stations, one of many factors in our analysis, not as the determining factor in our decision here.

[18] Although the presumption originally provided for the station's main studio to be located in the community of license, that criterion has been modified with the change in the main studio rule, Section 73.1125 of the Rules. The rule, which was modified to permit location of the main studio anywhere within the city-grade contour, is also applicable to the presumption regarding intent to serve the designated community. *Main Studio and Program Origination Rules*, 2 F.C.C. Rcd 3215, 3218 (1987).

programming needs of Santa Fe. KOB's speculative contention that KGSW's actual intent is otherwise fails to rebut this presumption. We proceed on the assumption that applicants will carry out their representations to us. *News International PLC*, 97 F.C.C. 2d 349, 356 (1984). There remain in place, however, several safeguards for insuring that an applicant fulfills its pledges, that it actually serves the designated community, and that it does not subvert the Commission's Table of Allotments. The Commission has, as KOB and KGSW both acknowledge, the ability to impose sanctions for misrepresentation, a KOB concern regarding KGSW's programming commitment to Santa Fe.[19] *See* 47 U.S.C. §312(a)(1); 47 C.F.R. §73.3513(d). And, as the Commission emphasized in adopting the three-element presumption, the risk of a renewal challenge for failure actually to serve the designated community "constitutes a more effective regulatory tool than utilization in advance of guidelines and factors that are inexact in divining intent." *Report and Order*, 93 F.C.C. 2d at 456. Thus, we harbor no Section 307(b) concerns with regard to the modification application before us.[20]

Contingent Request for Temporary Waiver of the Duopoly Rule

18. KGSW requests a temporary waiver of Section 73.3555(a)(3), the duopoly rule, so that it may continue KGSW-TV's service in the event there is an unanticipated delay between consummation of the assignment of Channel 2 and the implementation of the minor change.[21] KGSW asserts that such a waiver would be *pro forma* in that KKTO-TV would remain dark in the interim, resulting in no overlap of two operating stations. We disagree with KGSW's characterization of a grant of a duopoly waiver, even as a temporary measure, as *pro forma*. The duopoly rule generally prohibits the common ownership of two stations whose Grade B contours overlap, whether operating or not. Nonetheless, we believe the Commission's decision in *TVX Broadcast Group, Inc.*, 2 F.C.C. Rcd 1534 (1987), is applicable to KGSW's situation. In that case, the Commission found that the public interest would be served by grant of a six-month waiver of Section 73.3555's 12-station limitation, where the acquisition of a thirteenth station was unbuilt, where the assignee pledged to forbear from operation of that station, and where the assignee's divestiture efforts with regard to that station had already commenced. Analogous to the situation in *TVX Broadcast Group, Inc.* is the case before us, despite the overlap of the principal city contours of both stations, in which grant of a six-month waiver of Section 73.3555's duopoly rule would also be in the public interest: KGSW represents that it will surrender the license for Channel 14 upon implementation of the modification of Channel 2 and that it will refrain from operating one of the two stations during the waiver period. Accordingly, subject to those conditions, we shall grant KGSW a six-month waiver of the duopoly rules.[22]

19. Having considered all of the information submitted, we find the petition to deny, filed by KOB and considered as an informal objection with regard to the modification application, fails to raise a substantial and material question of fact requiring a hearing. *See, e.g., Astroline Communications, Inc. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). We further find that the applicants are fully qualified and that a grant of this application will serve the public interest.

20. Accordingly, IT IS ORDERED, That the petition to deny, filed by KOB-TV, Inc. IS DENIED.

21. IT IS FURTHER ORDERED, That the request by KGSW-TV, Inc. for a temporary waiver of Section 73.3555(a)(3) IS GRANTED for a period not to exceed six months from the consummation of the proposed transaction and subject to the condition that one of the stations remain dark for the period of the waiver. The application to modify the authorized facilities of KKTO-TV, BPCT-920723KG, IS GRANTED, and the application for consent to the assignment of KKTO-TV, Santa Fe, BALCT-920723KF, IS GRANTED, subject to KGSW's surrender of its Channel 14 license upon commencement of operations on Channel 2.

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[19] KGSW states in the modification application that it will shift the Channel 14 programming to Channel 2. We interpret that representation as a shifting of its programming format from one channel to another, but not as indicating any intention to abandon its obligation to provide news, public affairs and other programming tailored to the Santa Fe community.

[20] As support for its contention that the Commission should deny the move of Santa Fe's Channel 2 to Sandia Crest on Section 307(b) grounds, KOB again relies upon *Santa Fe Television*, 18 F.C.C. 2d 741 (1969), and *Son Broadcasting*, 79 F.C.C. 2d 598 (1980), cases in which previous applicants for Santa Fe stations also attempted to locate their transmitters at Sandia Crest. A *de facto* reallocation issue was specified in both cases, and a Section 307(b) issue was specified in *Santa Fe*, in order to determine whether the proposed operation would constitute a fair, efficient and equitable use of the frequency and to resolve the public interest question regarding the creation of a white area northeast of Santa Fe. In *Son Broadcasting*, the Commission refused to designate a separate Section 307(b) issue, finding those concerns to be subsumed within the context of the *de facto* reallocation issue. Both *Santa Fe* and *Son Broadcasting* were decided before we adopted the current policies for avoiding the *de facto* reallocation of channels in *Report and Order*, 93 F.C.C. 2d 436 (1983). Here, having concluded, after balancing several factors, that the loss of service is outweighed by other factors and that, under the three-pronged presumption, the objectives of Section 307(b) are not abrogated by a modified Channel 2, we find that our results in *Santa Fe* and *Son Broadcasting* lack Section 307(b) precedential value with regard to this case.

[21] KOB asserts that we should reject the waiver request solely on the grounds that it was submitted 13 days after the assignment application was filed and that it was not signed or accompanied by an amendment. We disagree. The applicants expressly indicated in Exhibit 5 of their assignment application that a "Contingent Request for Temporary Waiver" was attached. It is apparent that KGSW's failure to attach the waiver request to the application was inadvertent and its submission of a copy of that request 13 days later was appropriate.

[22] The Bureau has been delegated authority to act upon requests for such waivers when the requests are for 12 months or less, consistent with precedent, and involve no new or novel issues. *Vincent J. Curtis*, 6 F.C.C. Rcd 78, 78 n.3 (1991).

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO.
MCI INTERNATIONAL, INC.
WORLD COMMUNICATIONS, INC.

File No. I-T-D-92-005

Application for authority to discontinue operation of the TAT-5/MAT-1 Cable System and to modify the Cable Landing License

ORDER AND AUTHORIZATION

Adopted: December 23, 1992; Released: January 6, 1993

By the Chief, International Facilities Division:

1. The above-captioned uncontested application, filed on August 21, 1992 by American Telephone & Telegraph Co., MCI International, Inc. and World Communications, Inc. (Joint Applicants), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to permanently discontinue operation of the TAT-5/MAT-1 Cable System and to modify the submarine cable landing license accordingly. The application was placed on public notice on September 2, 1992. No comments were received.

2. The TAT-5 cable connects Green Hill, Rhode Island and San Fernando, Spain. At San Fernando, Spain, it is extended via a dedicated microwave system to Sesimbra, Portugal, with a capacity of 266 voice-grade circuits, and to MAT-1, comprising a dedicated microwave system between San Fernando and Estepona, Spain with a capacity of 417 voice-grade circuits. At Estepona, AT-1 connects to a submarine cable to Castelfusano, Italy. The initial capacity of the TAT-5 cable was 720 voice-grade circuits. That has been increased to 845 voice-grade circuits. The initial capacity of MAT-1 was 417 voice-grade circuits. Its capacity is now 640 voice-grade circuits. Construction of the TAT-5/MAT-1 cable was authorized in 1968,[1] and the cable was placed in service on March 22, 1970. On July 2, 1989, the MAT-1 cable failed because of deep sea fault. Temporary authority to restore service has been granted by the Commission. The owners believe it would not be economically feasible to repair it. The Joint Applicants state that off-the-shelf replacement parts for the entire cable system are no longer readily obtainable and that all circuits have been transferred to other transatlantic facilities. All grantees of circuits have been notified of the proposal to deactivate and retire TAT-5/MAT-1 in 1992, and none has expressed any objection or concern with respect to the retirement of the system.

3. Upon review of the application, we find that the TAT-5/MAT-1 Cable System has reached the end of its useful service life and all services have been transferred from TAT-5/MAT-1 Cable System to other facilities. Thus, there will be no impairment of service to any community or part of a community formerly served by the TAT-5/MAT-1 Cable System as a result of its retirement.

4. Accordingly, IT IS HEREBY CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the discontinuance of use and operation by the Joint Applicants of the TAT-5/MAT-1 Cable System and the substitution of other transatlantic facilities.

5. IT IS ORDERED that Cable Landing License, File No. S-C-L-40 IS HEREBY MODIFIED to delete the TAT-5/MAT-1 Cable System.

6. Within 60 days after the release of this order, the Joint Applicants shall notify the Commission of the accounting treatment they intend to use in retiring the TAT-5/MAT-1 Cable System.

7. Upon discontinuance of use and operation of the TAT-5/MAT-1 Cable System, the Joint Applicants shall notify the Commission thereof and submit to the Commission for cancellation of any submarine cable landing license they possess covering the TAT-5/MAT-1 Cable System.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applicantions for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *See* 13 FCC 2d 235 (1968). A submarine cable landing license was issued concurrently under File No. S-C-L-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SPRINT COMMUNICATIONS CO. L.P.

File No. I-T-C-92-211

Application for authority to acquire and operate facilities for service between the U.S. and Luxembourg

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 30, 1992; Released: January 6, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Luxembourg[1] by Sprint Communications Co., L.P. (Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-211 IS GRANTED, and Sprint is authorized to:

a. lease and operate 30 64-Kbps circuits between Sprint's New York Office and the TAT-9 cable terminal in Mannahawkin, New Jersey;

b. activate and operate a one-half interest in 30 64-Kbps circuits in the TAT-9 cable between the U.S. and St. Hilare, France;

c. lease and operate a one-half interest in 30 64-Kbps circuits in the terrestrial digital facilities between the St. Hilare cablehead and Luxembourg border; and

d. use said facilities to provide Sprint's regularly authorized services between the U.S. and Luxembourg.[2]

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Sprint and its correspondent in Luxembourg, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that our authorization for Sprint to provide private lines is limited to the provision of such private lines only between the U.S. and Luxembourg -- that is, private lines which originate in the U.S. and terminate in Luxembourg or which originate in Luxembourg and terminate in the U.S. In addition, Sprint may not -- and Sprint's tariff must state that Sprint's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that its correspondents afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further NPRM*, FCC 92-517, Released November 27, 1992.

5. IT IS FURTHER ORDERED that neither Sprint nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Sprint or any persons or companies controlling or controlled by Sprint are parties.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

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[1] In its application Sprint requests authority to acquire and operate facilities for the provision of common carrier services between the United States and Luxembourg and points beyond. We note that should Sprint obtain any interest in facilities beyond Luxembourg for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for Sprint to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[2] Sprint states that its correspondent in Luxembourg, Administration des Postes et Telecommunications, has agreed to provide all required matching facilities.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

U.S. ELECTRODYNAMICS, INC. File No. I-T-C-92-252

Application for authority
to lease and operate satellite
facilities for service to
various overseas points

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 30, 1992; Released: January 6, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and the points listed in the Appendix by U.S. Electrodynamics, Inc. (USEI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-252 IS GRANTED, and USEI is authorized to:

a. lease from Comsat and operate the numbers of satellite circuits listed in the Appendix between the Brewster, Washington earth station and appropriate INTELSAT satellites, connecting with similar circuits between the satellites and earth stations at the points listed in the Appendix furnished by USEI's correspondents;

b. own and operate circuits in the Brewster, Washington earth station to be used in conjunction with the satellite space segment capacity; and

c. use said facilities to provide international switched voice and private line services between the U.S. and the points listed in the Appendix hereto.[1]

3. IT IS FURTHER ORDERED that our authorization of USEI to provide private lines is limited to the provision of such private lines only between the United States and those countries listed in the Appendix hereto -- that is, private lines which originate in the United States and terminate in those countries or which originate in those countries and terminate in the United States. In addition, USEI may not -- and USEI's tariff must state that USEI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that its correspondents affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), and *Order on Reconsideration and Third Further NPRM*, FCC 92-517, released November 27, 1992.

4. IT IS FURTHER ORDERED that neither USEI nor any persons or companies directly or indirectly controlling or controlled by USEI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which USEI or any persons or companies controlling or controlled by USEI are parties.

5. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

6. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between USEI and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

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[1] Should USEI obtain any interest in facilities beyond the points listed in the Appendix hereto for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for USEI to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Country	Number of Circuits (64-Kbps)
Australia	38
Brunei Darussalem	3
Canada	20
China	10
Taiwan	35
Cook Islands	1
Fiji	1
France (New Caledonia)	1
France (Polynesia)	1
France (Wallis & Futura)	1
Hong Kong	35
Indonesia	10
Japan	20
Kiribati	1
South Korea	35
Malaysia	5
Mozambique	1
Nauru	2
New Zealand	10
Papua New Guinea	5
Philippines	42
Singapore	42
Solomons Islands	1
Thailand	5
Tonga	1
Tuvalu	1
Samoa	3
Guam	5
Marshall Islands	2
Micronesia	1
Midway	1
Palau	1
Saipan	1
Wake Island	1
Vanuatu	1
Western Samoa	1
Niue Islands	1
Mexico	10
Russia	43
Argentina	5
Austria	1
Belgium	1
Bolivia	1
Brazil	2
Chile	1
Colombia	1
Costa Rica	2
Denmark	1
Dominican Republic	1
Ecuador	1
El Salvador	1
France	4
Germany	3
Guatemala	1
Guinea	1
Honduras	1
Iceland	1
Ireland	1
Italy	2
Morocco	1
Netherlands	1
Netherland Antilles	1
Panama	1
Peru	1
Portugal	1
Spain	1
Switzerland	1
United Kingdom	10
United Kingdom (MCL)	1
Venezuela	1
Zaire	1

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Fred Daniel d/b/a
Orion Telecom

For a New Automated
Maritime Telecommunications
System at Walnut Grove,
California.

MEMORANDUM OPINION AND ORDER

Adopted: December 29, 1992; Released: January 8, 1993

By the Acting Chief, Special Services Division:

1. On January 27, 1992, Fred Daniel d/b/a/ Orion Telecom filed an application for an Automated Marine Telecommunications System (AMTS) station to be located in the vicinity of Walnut Grove, California. This application was listed on Public Notice number 1633, released on April 3, 1992. The window for opposition to this application closed on May 7, 1992. Anchor Media Television (Anchor) filed an Opposition with the Commission's Secretary on May 4, 1992, which was received by the Special Services Branch, Licensing Division, Private Radio Bureau, on May 8, 1992. Anchor is the present licensee of KOVR(TV), a channel 13 television station situated in Stockton, California.

2. AMTS stations provide automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system for tugs, barges, and other marine vessels. In establishing the rules permitting AMTS stations, the Commission considered the potential for interference to television reception, particularly channels 13 and 10 because of the proximity of AMTS channels and conditioned the operation of AMTS coast stations on the requirement that no harmful interference will be caused to television reception. *See* Section 80.215(h) of the Commission's Rules, 47 C.F.R. § 80.215(h). In filing the above captioned application, Orion has complied with all requirements set forth by the Commission in Section 80.215 to establish service including service contours, engineering studies, and appropriate showings of non-interference.

3. We are treating Anchor's filing as a Petition to Deny Orion's Application and have therefore applied the procedural rules provided in Section 1.962 of the Commission's Rules, 47 C.F.R. § 1.962. Anchor bases its argument upon the applicant's failure to provide a reasonable assurance of the transmitter site proposed in the application. Private Radio applicants, however, are not required to determine the availability of their transmitter sites at the time they file their applications. *See In re Applications of Lynn Twedt, et al.*, FCC No. 92-234, 7 FCC Rcd 3965 (1992). We therefore find Anchor's substantive argument to be without merit.

4. In addition, we find that Anchor's Opposition is procedurally defective. Section 1.962(g) of the Commission's Rules, 47 C.F.R. § 1.962(g), requires that a petition contain specific allegations of fact sufficient to make a prima facie showing be supported by an affidavit of a person or persons with personal knowledge thereof and be filed at the Commission's offices in Gettysburg, Pennsylvania no later than 30 days after the date of the public notice listing the application. Anchor's Opposition lacks an affidavit to support its allegations, and additionally, the Opposition was not filed in our Gettysburg office within the filing period.

5. For the reasons stated above, we conclude that petitioner's Opposition to Application is without merit. Accordingly, IT IS ORDERED that the Opposition to Application filed by Anchor Media Television, IS DENIED and Orion Telecom's application for a new automated maritime telecommunications system IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Herbert W. Zeiler
Acting Chief, Special Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application and Matters of

JOHN M. SALOV File No. BPH-890118MD

For Construction Permit for
a New FM Station at
Hudson, Michigan

and

Window Notice for the Filing of
FM Broadcast Applications
CF-12A, Hudson, Michigan

and

Amendment of	**MM Docket No. 88-284**
Section 73.202(b),	
Table of Allotments,	RM-6138
FM Broadcast Stations.	*RM-6474*
(Angola, Berne, Decatur,	RM-6489
Lagrange and Roanoke,	
Indiana; and Brooklyn	
and *Hudson, Michigan)*	

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1992; Released: January 8, 1993

By the Commission:

1. The Commission has before it the following pleadings filed by John M. Salov ("Salov") regarding his application (File No. BPH-890118MD) for a new FM station at Hudson, Michigan: an Application for Review filed on September 18, 1989; a Petition for Leave to Amend filed on November 20, 1989; an application for construction permit filed on December 5, 1989; and a Precautionary Petition for Leave to Amend filed on December 14, 1989. Salov also filed a Petition for Reconsideration and a supplement thereto of the *First Report and Order* in MM Docket No. 88-284, 4 FCC Rcd 7093 (Mass Med. Bur. 1989) ("*Hudson Rule Making*"). Because the Application for Review regarding Salov's application and the Petition for Reconsideration of the rule making present similar issues, we are consolidating these proceedings for disposition on our own motion. For the reasons set forth below, we deny the Application for Review and the Petitions for Leave to Amend and return Salov's application. We also dismiss Salov's Petition for Reconsideration in MM Docket No. 88-284.

Background

2. On December 13, 1988, the Commission released a Window Notice for the Filing of FM Broadcast Applications, Report No. CF-12, which inadvertently listed, *inter alia*, Channel 249A at Hudson, Michigan, as a vacant FM allotment for which applications could be submitted beginning on December 13, 1988, and ending on January 18, 1989. While a construction permit for Channel 249A had been previously granted, the original permittee never constructed pursuant to its authorization and the permit lapsed.[1] Thus, the inadvertent window was opened pursuant to Section 73.3564(d)(5). However, at the time the Channel 249A window was opened on December 13, 1988, there was a separately pending request to delete Channel 249A and substitute Channel 225A at Hudson. This request was premised on the fact that spacing requirements for Class A stations had made the vacant Hudson allotment short-spaced to the licensed site of WDFM(FM), Defiance, Ohio. The request had been treated as a counterproposal in MM Docket No. 88-284, and placed on Public Notice on August 22, 1988, Report No. 1745.

3. Accordingly, the Mass Media Bureau ("Bureau") released a *Public Notice* on January 13, 1989, rescinding the filing window for Channel 249A at Hudson due to the enumerated short-spacing. The *Public Notice* stated that the listing of Channel 249A on the December 13, 1988, window notice was inadvertent. It also noted the pending counterproposal in MM Docket No. 88-284 and indicated the Commission would allot a replacement Class A channel to Hudson, Michigan, at a later date.

4. Despite the fact that Salov was aware of the *Public Notice* rescinding the filing window for Channel 249A on January 16, 1989, Salov filed his application two days later. Salov's application acknowledged the fact that there were no sites from which a Class A station could provide the required signal strength to the city of license and be fully-spaced. Thus, Salov requested a waiver of the spacing requirements. Salov's application was accompanied by a petition seeking reconsideration of the Bureau's action rescinding the window and seeking acceptance of his application for Channel 249A at Hudson, Michigan.

Petition for Reconsideration of the Window Rescission

5. In his Petition for Reconsideration Salov again acknowledged that "no transmitter site was available [on Channel 249A at Hudson] which was not short-spaced to some other station." Salov also stated that he was aware that the Commission had announced on December 12, 1988, that it had adopted new rules which would allow the use of directional antennas by short-spaced FM stations to protect other FM stations. Even though the specific standards for the use of directional antennas had not yet been released, Salov believed that he would be able to develop a

[1] The construction permit was initially granted to CCM, Inc., on May 16, 1984. An application for a replacement permit filed by Metro Program Network, Inc., was denied, the permit was cancelled and the call letters were deleted on December 22, 1987.

proposal to satisfy the Commission's new interference requirements. Moreover, Salov was aware the *News Release* announcing the directional antenna rules specifically stated that "these changes do not alter the Table of FM Allotments" and that the Commission "would continue to maintain strict minimum distance separation in the *allotment* of FM channels." *News Release*, Report No. DC-1304, released December 12, 1988. Nevertheless, Salov disregarded this warning because, he contended, Channel 249A at Hudson, Michigan, was "not a new allotment."

6. Salov argued that it was arbitrary and capricious to rescind the Channel 249A filing window one business day prior to the filing deadline.[2] Salov contended that the Mass Media Bureau "acted with undue haste" in rescinding Channel 249A from the filing window. Moreover, Salov argued that the short-spacing or "technical difficulties" were not "insuperable" because "there is no reason to suppose that a directional antenna cannot be installed to solve the short-spacing problem." Finally, Salov contended that Channel 249A should not have been rescinded because he "had already expended large amounts of money and effort in the preparation of [his] application."

7. On August 31, 1989, the Bureau denied Salov's Petition for Reconsideration. The Bureau stated that it did not act with "undue haste" nor did it unreasonably delay in rescinding the filing window for Channel 249A. Noting that it was unfortunate that the action rescinding the channel was close in time to the filing deadline, the Bureau found that the timing of the sequence of events did not indicate that the actions were arbitrary or capricious. the Bureau further stated that the applicability of the directional antenna provisions adopted in MM Docket 87-121 were not at issue, because the rescission of the filing window precluded Salov from even filing an application seeking the benefit of the new directional antenna rules. Finally, the Bureau stated that substitution of a new channel at Hudson, Michigan, was being considered and that Salov could submit an application if a new filing window were opened. Salov sought review of this action.

8. On September 6, 1989, the Bureau allotted Channel 273A to Hudson, and deleted Channel 249A from the community as technically defective. The Bureau noted that Salov had filed an application for Channel 249A and stated that "the applicant filed its application with full knowledge that, on the date the application was filed, there was no authorized filing window for the allotment.... Accordingly, the pendency of the application is given no weight in our determination." *Hudson Rule Making*, 4 FCC Rcd at 7094 n.11. The application filing window for Channel 273A opened on November 14, and closed on December 14, 1989. On November 20, 1989, Salov filed a Petition for Leave to Amend his returned application to change the channel specified in the application to Channel 273A. Thereafter, on December 5, 1989, Salov also filed a new application for Channel 273A at Hudson, Michigan. On December 14, 1989, Salov filed a Precautionary Petition for Leave to Amend in which he again requested that his application for Channel 249A be amended to specify operation on Channel 273A. Also on December 14, 1989, Mid-America Radio Group, Inc., filed an application for Channel 273A at Hudson (File No. BPH-891214MY).

Application for Review

9. Salov contends that he is entitled to rely on the rescinded filing window *Public Notice* that was issued for Channel 249A, Hudson, Michigan. Salov claims that he in fact did rely on this window notice and prepared his application for this channel expending time, effort and money. Salov concedes that, if "by mistake" a filing window were opened soliciting "applications which might result in an intolerable short-spacing to some existing station," the Commission could certainly take action to rectify this mistake. However, Salov insists that the filing window for Channel 249A was not a mistake.

10. Salov reiterates his argument that the use of Channel 249A at Hudson was rendered "workable" because of the adoption of rules allowing the use of directional antennas by applicants and licensees so as to protect existing stations from interference resulting from minor short-spacing.[3] While conceding that the directional antenna rules did not become effective until June 26, 1989, Salov contends that, as matters *now* stand, he could design a facility to protect the short-spaced stations. He claims that this situation is analogous to *Special Markets Media, Inc.*, 4 FCC Rcd 5753 (1989), where applications were reinstated. Salov also contends that a site at Hudson could have been selected which would not have been short-spaced, but which would have required a waiver of the city coverage requirements of the Commission's rules. Salov asserts that an application could now be filed in conformance with the applicable Commission rules.

11. Finally, Salov asserts that Section 73.213 of the Commission's Rules purports to "grandfather" old allotments, such as Channel 249A, and provides flexibility for stations operating under these old allotments to change their transmitter sites and operating facilities. Moreover, Salov cites Section 73.215 of the Commission's Rules as allowing the use of directional antennas where Section 73.213 does not offer adequate flexibility. Ultimately, Salov believes that because it would be "feasible" to design a "workable" application for Channel 249A at Hudson, Michigan, the filing window notice should not have been cancelled and his Petition for Reconsideration should have been granted.

Petition for Reconsideration in MM Docket No. 88-284

12. In his Petition for Reconsideration of the Bureau's action amending the Table of Allotments and opening a new filing window, Salov reiterates that Channel 249A was a "workable" allotment, and as such, it should not have been deleted and the filing window should not have been cancelled. He argues that because he relied upon the filing window for Channel 249A, his application should receive cut-off protection from any other applications for the newly allotted Channel 273A at Hudson. Therefore, Salov re-

[2] The deadline for filing applications specified in the erroneous window notice was January 18, 1989. The *Public Notice* rescinding the filing window for Channel 249A was released Friday, January 13, 1989. Monday, January 16, 1989, was a federal holiday.

[3] *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, 4 FCC Rcd 1681 (1989) ("*Directional Antennas*").

quests the cancellation of the filing window for Channel 273A and the issuance of an order directing him to amend his application to specify Channel 273A.

Discussion

Application for Review

13. We will deny Salov's Application for Review because we believe the Bureau's action was appropriate. Section 73.3564(d) of the Commission's Rules clearly states that applications for new FM stations will be accepted only on dates specified by the Commission. An applicant, such as Salov, is allowed to file an application only during an appropriate filing window. If there is no filing window for an allotment, or it the filing window is rescinded as occurred in this case, no application may be filed. Salov was aware that the filing window for Channel 249A had been rescinded at the time he filed his application. Salov's action in tendering his application for filing when there was no filing window open does not unilaterally confer upon his proposal any of the characteristics or protections of a valid application. Moreover, granting Salov such protections could adversely affect other parties who complied with the Commission's rules and did not file applications once the filing window was rescinded. Thus, the Bureau acted in an appropriate manner in denying Salov's Petition for Reconsideration.

14. While we believe the fact that Salov filed his application knowing that there was no authorized filing window is dispositive of this case, we also wish to make clear that the Bureau properly determined that no filing window should have been opened for Channel 249A at Hudson. We begin with the premise that "the Commission has never knowingly approved any short-spaced [allotments.]" *Vass, North Carolina*, 45 RR 2d 1741, 1742 (B'cast Bur. 1979). Moreover, "the Commission has a strong interest in preserving the integrity of the Table of Allotments and the mileage separation criteria upon which the Table is based." *Chester and Wedgefield, South Carolina*, 5 FCC Rcd 5572 (1990). Indeed, long-established precedent holds that strict adherence to the spacing requirements in the Table of Allotments is "necessary ... in order to provide a consistent, reliable and efficient scheme of [allotting] FM channels." *Millington, Maryland*, 45 RR 2d 1689, 1690-1 (B'cast Bur. 1979).

15. It is our established practice to remove existing vacant FM allotments that do no meet the minimum mileage separation requirements when the opportunity arises. Plainly, "[t]hese channels are inefficient ..., and the public interest and our [allotment] objectives are best served, in our judgment, by deleting such [allotments]." *Terrell Hills, Texas*, 23 RR 2d 1733, 1734 (1972). In the *Terrell Hills* proceeding the Commission deleted a short-spaced allotment which had become vacant. We took this action without a prior rule making because we determined that such a proceeding was unnecessary and would serve no public interest purpose.[4] The Commission has also deleted short-spaced allotments which were erroneously made even though an application had already been filed for the allotment. *Pinckneyville, Illinois*, 41 RR 2d 69 (B'cast Bur. 1977). *See also, Sparta, Georgia*, 42 RR 2d 625 (B'cast Bur. 1978). Moreover, the Commission has substituted channels on its own motion in order to correct a short-spacing situation where the allotment was unoccupied. *San Manuel, Arizona*, 39 RR 2d 418 (B'cast Bur. 1976). *See also, Midlands, Monahans, Brownfield, and Seminole, Texas*, 52 FCC 2d 233 (1975).

16. The Commission's policy against creating short-spaced allotments and in favor of deleting vacant short-spaced allotments when the opportunity arises fully supports the Bureau's actions in rescinding the filing window for Channel 249A and refusing to accept applications for this short-spaced channel. While it is unfortunate that the filing window was inadvertently opened, the staff acted properly to rescind the filing window. The fact that Salov may have expanded resources preparing an application for a defective allotment is not a valid reason for precluding the Commission from deleting the filing window for the allotment that is unquestionably in violation of the Commission's spacing requirements. *See The Florida Institute of Technology, Inc.*, 4 FCC Rcd 1549 (1989)(staff mistake in issuing cut-off list not grounds for accepting application). Thus, the Bureau acted properly in rescinding the filing window.

17. Salov's arguments that the "grandfather" provisions of Section 73.213 apply to short-spaced allotments are rejected. Section 73.213 applies to short-spaced *stations*. When an *allotment* becomes vacant, as is the case for the Hudson allotment, Section 73.213 is no longer relevant.

18. Moreover, Section 73.215 was never intended to be used to permit short-spaced *allotments*, as Salov argues. We stated in adopting the directional antenna rules that, "[n]o change is made in the current FM channel allotment process, under which proposals for new channel allotments must meet minimum distance separations with respect to other co-channel stations and adjacent channel stations." *Directional Antennas*, 4 FCC Rcd at 1681. While Channel 249A was technically not a "new channel allotment," it was appropriately treated in the same manner because it became vacant on December 22, 1987, after the former construction permit was forfeited. To permit an applicant to use the provisions of Section 73.215 to activate a short-spaced allotment, whether new or previously occupied, would clearly undermine our long-standing intent to maintain only fully-spaced allotments in the Table of Allotments. Thus, the directional antenna rules designed for use by applicants for fully-spaced allotments can not be used to justify a short-spaced allotment as advocated by Salov.

Petition for Leave to Amend and Replacement Application

19. Salov argues that "[s]imple considerations of justice and equity" should allow him to amend the application he filed in response to the rescinded filing window *Public Notice* for Channel 249A at Hudson. Salov notes that because "the application for Channel 249A was never accepted for tender, the 30 day period for filing amendments as of right has never expired, and the application may be amended, as a matter of right." Salov also claims that he

[4] The Commission rescinded this action, but not the rationale, only after it was shown that a fully-spaced site was available. *Terrell Hills, Texas*, 35 FCC 2d 482 (1972). Here, Salov has conceded that no fully-spaced site is available.

had "timely filed" an application pursuant to the subsequently rescinded filing window *Public Notice*. Salov asks that the application he filed in response to the window notice for Channel 273A at Hudson be treated as "either an amendment to Salov's original application or as a replacement for such application."

20. When adopting the window processing system for FM applications, the Commission clearly stated that only applications filed within a relevant window period would be processed for consideration. *Amendment of Sections 73.3572 and 73.3573 Relating to Processing of FM and TV Broadcast Applications*, 58 RR 2d 776, 784 (1985). Because Salov's application was not filed within a relevant window period it was returned prior to acceptance and is therefore not pending for purposes of amendment. Accordingly, it could not be amended to cure the defect of being filed outside of any relevant filing window. Indeed, because Channel 249A was rescinded from the filing window, no application could have been accepted for filing on that channel. In view of the foregoing, Salov's attempts to amend his application are rejected.

21. When Salov submitted his December 5, 1989, application and requested that it alternatively be accepted as a "replacement" application, he did not submit a filing fee. He stated that "[s]ince Salov has already paid the $1,800 filing fee, no new filing fee is being submitted with this application." Salov seeks to use the same fee payment to cover both his original application for construction permit for which an application for review is pending and his subsequent application for construction permit on Channel 273A.

22. From the outset of the fee program, the Commission has required that every feeable application or other filing be accompanied by the full fee payment, with the limited exception of an application filed with a petition to defer a fee payment. *See* 47 C.F.R. §1.1107; *see also, Establishment of a Fee Collection Program*, 2 FCC Rcd 947, 954 (1987), *recon. denied*, 3 FCC Rcd 5987, 5991 (1988). In the absence of a timely filed fee payment, the Commission will return the subject application without processing. 3 FCC Rcd at 5991. Moreover, the Commission has specifically declined to permit the use of a fee submitted with a returned application to cover a replacement application. 3 FCC Rcd at 5988. Finally, a fee payment is required under the Commission's rules not only to cover an application, but also is required before an appeal of a dismissal of an application may be considered. 47 C.F.R. §1.1116; 3 FCC Rcd at 5991. Thus, Salov's fee payment was not available for credit to another application since his application for review was pending at the time his second application was filed, and his fee payment was a necessary prerequisite to substantive action on that application for review. Therefore, Salov's December 5, 1989, application will be returned for failure to timely submit the requisite fee payment.

Petition for Reconsideration of MM Docket No. 88-284

23. As a final matter, we will dismiss Salov's Petition for Reconsideration in MM Docket No. 88-284. The reconsideration is premised on the pendency of the application for Channel 249A at Hudson. The denial of Salov's Application for Review and Petitions for Leave to Amend remove any basis for continued consideration of the Petition for Reconsideration.

24. Accordingly, for the reasons set forth herein, IT IS ORDERED THAT Salov's Application for Review and Petitions for Leave to Amend ARE DENIED and his application for construction permit IS RETURNED. IT IS ALSO ORDERED THAT the Petition for Reconsideration filed by John M. Salov of the *First Report and Order* in MM Docket No. 88-284 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-211

In the Matter of

Amendment of Section 73.202(b), RM-8061
Table of Allotments,
FM Broadcast Stations.
(Lumberton, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 7, 1992; Released: January 8, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 6236 (1992), issued in response to a petition filed by Stone-Lamar Broadcast Services Corporation ("petitioner") proposing the substitution of Channel 237C1 for Channel 237C2 at Lumberton, Mississippi.[1] Petitioner also requested modification of its license for Station WLUN, Channel 237C2, to specify operation on Channel 237C1. Petitioner filed comments in which it reaffirmed its interest in the channel. Franklin Communications Partners, L.P. ("Franklin") filed comments.[2]

2. We believe the public interest would be served by the substitution of Channel 237C1 for Channel 237C2 at Lumberton, since it would provide expanded reception service to the community. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[3] Channel 237C1 is short spaced to Channel 237A, Station WJDB-FM, Thomasville, Alabama. However, the license for Station WJDB-FM, Channel 237A, was modified in MM Docket 90-563 to specify operation on Channel 237C2.[4] Channel 237C1 is also short spaced to the allotment site for Channel 235C, Mobile, Alabama. However, Station WKSJ-FM, Mobile, has a construction permit for Channel 235C that is fully spaced to Channel 237C1 at Lumberton (BMPH-900427ID). Therefore, the grant of a license for Channel 237C1 at Lumberton may be withheld until Station WJBM-FM and Station WKSJ-FM are licensed on their new channels. In addition, we have authorized a modification of the license for Station WLUN, Channel 237C2, Lumberton, Mississippi, to specify operation on Channel 237C1, in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 22, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Lumberton, Mississippi	237C1

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WLUN, Channel 237A, Lumberton, Mississippi, IS MODIFIED to specify operation on Channel 237C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Laura B. Humphries
Leventhal, Senter
& Lerman
2000 K St., N.W.
Suite 600
Washington, D.C. 20006
(Counsel for Station WKSJ-FM, Mobile, Alabama)

Griffin Broadcasting
Corporation
832 Partridge Lane
Albany, Georgia 31707
(Licensee of Station
WJDB-FM)

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Stone-Lamar Broadcast Services Corporation, licensee of Station WLUN, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

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[1] The license for Station WLUN was modified in MM Docket 89-577 to specify operation on Channel 237C2 in lieu of Channel 237A. *See* 5 FCC Rcd 5269 (1990). Petitioner holds a construction permit for Channel 237C2 (BMPH-920917JJ) that expires on May 13, 1993.

[2] Franklin, licensee of Station WKSJ-FM, Mobile, Alabama, filed comments stating it did not object to the WLUN upgrade, so long as WKSJ-FM is afforded full interference protection at its existing site for Channel 235C.

[3] The coordinates for Channel 237C1 at Lumberton are 30-39-34 and 89-09-59.

[4] *See* 7 FCC Rcd 4463 (1992).

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-219

In the Matter of

Amendment of Section 73.202(b), RM-8039
Table of Allotments,
FM Broadcast Stations.
(Tarkio, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 11, 1992; Released: January 8, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 6374 (1992), issued in response to a petition filed by KANZA, Inc. ("petitioner"), proposing the substitution of Channel 228C3 for Channel 228A at Tarkio, Missouri. Petitioner also requested modification of its license for Station KTRX(FM), Channel 228A, to specify operation on Channel 228C3. Petitioner filed comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 228C3 for Channel 228A at Tarkio since it would provide expanded reception service to the community. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[1] In addition, we have authorized a modification of the license for Station KTRX(FM), Channel 228A, Tarkio, Missouri, to specify operation on Channel 228C3, in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 22, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Tarkio, Missouri	228C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KTRX(FM), Tarkio, Missouri, IS MODIFIED to specify operation on Channel 228C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, KANZA, Inc., licensee of Station KTRX(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 228C3 at Tarkio are 40-33-50 and 95-15-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-644

In the Matter of

Amendment of Section 73.202(b),	RM-7543
Table of Allotments	RM-7688
FM Broadcast Stations.	
(Crozet and Dillwyn, Virginia)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 11, 1992; Released: January 8, 1993

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration of the *Report and Order* ("*R&O*") in this proceeding, 6 FCC Rcd 5159 (1991), filed by Commonwealth Audio Visual Enterprises, Inc. ("petitioner").[1] James Madison University ("JMU") filed a opposition to the petition for reconsideration, and petitioner filed a reply.

2. The *Notice of Proposed Rule Making* ("*Notice*"), 6 FCC Rcd 105 (1991), proposed the allotment of Channel 230A to Crozet, Virginia, at JMU's request. A counterproposal was filed requesting the allotment of Channel 229A to Dillwyn, Virginia as that community's first local FM transmission service. In the *R&O*, we allotted Channel 278A instead of Channel 230A to Crozet to accommodate the allotment of Channel 229A to Dillwyn. We also reserved Channel 278A for noncommercial use, at JMU's request, after determining that reservation appeared to be the only way to provide a noncommercial educational channel to Crozet. The allotment of Channel *278A at Crozet was short-spaced to pending applications filed by petitioner and Oscar Haynes for Channel 277A at New Market, Virginia. The applicants for Channel 277A were provided with an opportunity to amend their applications to specify a conforming site.

3. Petitioner, who did not file comments in response to the *Notice*, contends that the staff erred in its conclusion that a noncommercial FM service cannot be operated at Crozet, Virginia, on a channel in the noncommercial educational band. Petitioner argues that Channel 203A can be used at Crozet consistent with the Commission's Rules.

4. Petitioner asserts that it has been prejudiced by the staff's action since its application had been designated for hearing prior to the time the Commission began to evaluate the comments and counterproposals filed in this rule making. Petitioner argues that while the specification of a transmitter site in an application represents only a preference for a particular site, once a case is designated for hearing, an applicant's transmitter site is more than "a mere preference" for a particular site. Petitioner contends that at some point the Commission must accord an applicant's transmitter site the same status as a cut-off rule making proposal. Petitioner states that significant amounts of time and money are spent by applicants and by the Commission in making critical public interest evaluations based on the transmitter sites specified by the applicants. Petitioner maintains the Commission should not disrupt the hearing process once it is underway by requiring applicants to modify their transmitter sites.

5. Petitioner claims that if it must amend its transmitter site, it will be required to construct a new tower on a mountain ridge where now there are only trees. Petitioner notes that its currently specified site calls for use of an existing tower.[2]

6. In opposing comments, JMU argues that no noncommercial educational channels are available at Crozet. JMU argues that petitioner fails to refute its statement that the proximity of Station WTVR-TV, Television Channel 6, Richmond, Virginia, would preclude public radio service to substantial portions of Nelson County and southernmost Albermarle County if channels at the lower end of the reserved band were used. JMU claims that neither petitioner's engineering statement nor its assertion that use of a reserved band channel might be theoretically possible is persuasive. JMU further contends that petitioner's failure to file comments in response to the *Notice* precludes consideration of its objections at this time. JMU maintains that petitioner had notice that the allotment of another channel was possible as the result of the filing of a counterproposal. Lastly, JMU argues that petitioner seeks only to defend the site preference in its pending application at New Market. JMU contends that the Commission has never protected an applicant's preferred transmitter site from a rule making which proposes a new service, citing *Las Vegas, Nevada*, 51 Fed. Reg. 9453 (1986); *Cookeville, et. al., Tennessee*, 5 FCC Rcd 677 (1990); and *Andalusia, Alabama*, 49 FR 32201, (published August 13, 1984).

7. We conducted an engineering analysis to see if the reference coordinates for Channel *278A at Crozet could be site restricted to avoid a short-spacing with the site originally specified by petitioner in its application for Channel 277A at New Market. Our engineering analysis indicates that a change in the site restriction for Channel *278A will eliminate any conflict with petitioner's original transmitter site. We note that two applications have been filed for Channel *278A at Crozet, by JMU and by Community Educational Service Council. Both meet the minimum spacing requirements to petitioner's original application site as well. Therefore, we will amend the reference coordinates for Channel *278A at Crozet to specify the alternate site.[3] This action will not prejudice the applicants for the channels at Crozet or New Market.

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[1] Commonwealth is the permittee for a new radio station at New Market, Virginia, on Channel 277A. *See John D. Bomberger et al. (Initial Decision)*, 7 FCC Rcd 1849 (1992), *app. for rev. pend.*

[2] Petitioner also claimed that use of its original site would permit a comparative coverage preference over that of the competing applicant. This contention is moot, as Commonwealth amended its application to relocate its antenna site to avoid a short-spacing to the Crozet allotment.

[3] The new coordinates for Channel *278A at Crozet are North Latitude 37-58-26 and West Longitude 78-43-57 with a site restriction of 10.8 kilometers (6.7 miles) south.

8. We take this opportunity to address the other arguments raised by petitioner on reconsideration. We disagree that no public notice was given for the allotment of an alternate channel at Crozet. Although the *Notice* proposed the allotment of Channel 230A to Crozet, it also stated that the filing of a counterproposal may lead to the allotment of a different channel than originally requested. *See* Paragraph 3(c) of the Appendix to the *Notice*. Petitioner therefore had notice that a channel other than Channel 230A could be allotted and the opportunity to participate as did any other party interested in this proceeding.[4] The use of an alternate channel complied fully with our precedent which affords the Commission flexibility to use substitute channels to resolve conflicts between mutually exclusive proposals. *See Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990).

9. We also disagree that the staff erred in allotting a channel to Crozet that conflicted with petitioner's application. As we explained in the *R&O*, rule making proposals which provide new service benefits are generally preferred over an application which represents a preference for a particular site. *See Andalusia, Alabama*, and *Las Vegas, Nevada*. Consistent with our policy, no distinction was made based on the fact that petitioner's application had been designated for hearing.[5]

10. Therefore, IT IS ORDERED, That the petition for reconsideration filed by Commonwealth Audio Visual Enterprises, Inc., IS DENIED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief
Policy and Rules Division
Mass Media Bureau

[4] While petitioner alleges that Channel 203A can be allotted to Crozet and used for a noncommercial operation, our engineering analysis confirms that the allotment of Channel 203A would create interference to the operation of Station WTVR-TV, Channel 6, Richmond, Virginia.

[5] In September 1992, the Commission adopted a new cut-off rule that limits an FM applicant's vulnerability to conflicting rule making petitions. The Commission stated that the cut-off rule will reduce the exposure that FM applicants currently have vis-a-vis conflicting rule making petitions and the concomitant delays in the processing of their applications. *See Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 7 FCC 4917 (1992), *recon. pend.* Since the new rule is applicable prospectively, it does not apply to this case.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-299

In the Matter of

Amendment of Section 73.606(b), RM-8049
Table of Allotments,
TV Broadcast Stations.
(Appleton, New London and
Suring, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 8, 1992; Released: January 8, 1993

Comment Date: March 1, 1993
Reply Comment Date: March 16, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Wisconsin Voice of Christian Youth, Inc. ("petitioner"), licensee of Television Station WSCO, Channel 14, Suring, Wisconsin. Petitioner seeks to reallot Channel 14 to either Appleton, Wisconsin, or New London, Wisconsin, and to modify its authorization accordingly, pursuant to Commission Rule 1.420(i).[1]

2. Petitioner argues that Suring, a community of 581 persons,[2] is unable to support a full-service television station, and that as a result, it is unable to meet the station's financial needs. Petitioner notes that it had been operating Station WSCO with a low power transmitter pursuant to special temporary authority, but the station is currently off the air.[3]

3. In requesting the change of community, petitioner notes that Appleton (population 56,780) currently has one licensed television service, Station WXGZ, Channel 32. Petitioner includes an engineering statement which shows that the proposed change in community will allow the petitioner to upgrade Station WSCO's facilities to provide service to 662,390 people, as opposed to the 275,275 persons served by the station at its present site. Petitioner states that the move would create a gray area of 389 square kilometers with a population of 776 persons, and an area of 113 square kilometers and 140 persons with two reception services. Alternatively, petitioner states that it would seek the reallotment of Station WSCO to New London, Wisconsin (population 6,658), as that community's first local transmission service. Petitioner does not indicate whether the New London proposal would create a gray area.

4. Petitioner acknowledges that both Suring and Appleton are within the freeze area of Milwaukee, Wisconsin.[4] Petitioner argues that the freeze does not preclude the requested change in Station WSCO's community of license, as the *Freeze Order* explicitly stated that "the freeze on petitions to amend the TV Table of Allotments and construction permit applications for vacant television allotments will not apply to changes requested by existing stations."[5] Since Station WSCO is an existing station, petitioner argues, the *Freeze Order* by its own terms permits consideration of this petition. Petitioner further concludes that since the requested change does not result in any real decrease in broadcast spectrum available for new technologies in the Milwaukee area, the underlying rationale for the freeze is not applicable to the proposed change. As an alternative, petitioner states that if the freeze is deemed applicable here, it should be granted a waiver and allowed to pursue its proposal.

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[1] This petition for rule making was originally dismissed by letter on the grounds that the proposal would not result in a preferential distribution of facilities under our allotment priorities and policies. The letter noted that this proposal would remove Suring's only local transmission service. *See Letter* from Chief, Allocations Branch, Policy and Rules Division, to counsel for Wisconsin Voice for Christian Youth, Inc. (July 28, 1989). Petitioner filed an appeal of the letter dismissal and again requested the initiation of a rule making proceeding.

After petitioner filed its appeal, the Commission stated that waivers of the prohibition on removal of a community's only local transmission service would be considered in conjunction with petitions to change community of license. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License (Memorandum Opinion and Order)* ("*Community of License MO&O*"), 5 FCC Rcd 7094, 7096 (1990). Therefore, we now believe that seeking additional comment on petitioner's proposal is warranted. We issue this *Notice* and will dismiss petitioner's petition for reconsideration as moot at the termination of this proceeding. We will treat petitioner's petition for reconsideration as comments to this proceeding. We note that Aries Telecommunications Corporation ("Aries"), licensee of Television Station WGBA, Channel 26, Green Bay, Wisconsin, filed an opposition to the petition for reconsideration. We will consider the opposition in conjunction with the final resolution of this proceeding. Aries will be served with a copy of this *Notice*.

[2] Population figures are from the 1990 U.S. Census, unless otherwise indicated.

[3] By letter dated July 11, 1991, WSCO informed the Commission that it had to suspend station operations due to circumstances beyond its control. WSCO has sought authority to remain silent pending the outcome of this proceeding.

[4] *See Order, Advanced Television Systems and Their Impact on the Existing Television Service* ("*Freeze Order*"), 52 Fed. Reg. 28346, published July 29, 1987. The *Freeze Order* states that the Commission will not accept applications for construction permits for vacant television allotments within the minimum co-channel separation of thirty cities, including Milwaukee, pending completion of the advanced television proceeding.

[5] Petitioner paraphrased the language from the *Freeze Order*. More accurately, the *Freeze Order* explicitly stated that "No petitions to amend the table will be accepted for these areas. Further, construction permit applications for vacant television allotments in these areas will not be accepted. This freeze, however, will not apply to changes requested by existing stations. Moreover, applications and petitions for rule making already on file will continue to be processed as usual."

5. We believe the public interest would be served by soliciting comment on petitioner's proposal. While this proposal would remove the sole local television transmission service from Suring, it would permit the continuing operation of Station WSCO as a full service station. Otherwise, petitioner claims, the station may not go back on the air. If Channel 14 is allotted to Appleton, it would enable Station WSCO to provide a second local commercial television transmission service to a much larger community, and reception service to more than twice as many people as can be served from its current location.[6] If petitioner pursues the change at New London, the proposal would provide a first local television transmission service to that community. We request that petitioner specify which proposal it will pursue.

6. Although the *Community of License MO&O* restricts the removal of a community's sole local broadcast service, that document also states that a waiver of the prohibition will be considered "in the rare circumstances where removal of a local service might serve the public interest." *Id.*, 5 FCC Rcd 7096. As an example, we noted that we might consider removal of a sole local transmission service if reallotment would provide a first reception service to a significantly sized population, a higher priority under our television allotment criteria. In general, we do not believe that the public interest is served by removing a community's sole local transmission service merely to provide a first or second local transmission service to another community. In this case, petitioner maintains removal of Station WSCO from Suring will ensure the continued operation of the station, and will ultimately provide reception service to twice as many people as are currently served. We request comment as to any other public interest benefits that may result from this proposal.

7. The *Community of License MO&O* stated that the public has a legitimate expectation that existing service will continue, and this expectation is a factor to be weighed independently against the service benefits that may result from reallotting a channel. Removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service. This proposal would remove Suring's only local transmission service. In addition, the proposal may seriously affect reception service in some areas, as it would create a gray area with a population of 776 persons and an area of 140 persons with two reception services. Petitioner notes that while there is no cable television in these areas, it can be assumed that some of the residents receive services by using high antennas or satellite dishes, and therefore the effect of the proposed Station WSCO move on reception service would be minimal. On the other hand, we recognize that denial of this proposal could lead to Station WSCO remaining off the air. We request petitioner to submit additional information regarding any possible disruption regarding removal of Suring's local transmission service and how that disruption can be minimized. We also request information regarding the availability of reception services in the gain and loss areas following a move to either Appleton or New London, the total population within each area, and the reception services available within Station WSCO's current service area.

8. We tentatively conclude that the *Freeze Order* applies in instances when, as here, a television licensee or permittee seeks to change its community of license and facilities to a site closer to a freeze area. The *Freeze Order* was adopted in order to preserve spectrum options in areas where the Commission believed that additional station assignments would unduly restrict possibilities for providing additional spectrum for advanced television. If a television station was permitted to change its channel to a new community of license and relocate its transmitter site closer to a restricted area, the intent of the *Freeze Order* may be defeated. In this case, the freeze area extends to 248.6 kilometers (154.5 miles) from Milwaukee. The present site of Channel 14 at Suring is 220 kilometers (137 miles) from Milwaukee. The proposed site for Channel 14 at Appleton is 164.9 kilometers (102.5 miles) from Milwaukee, and the proposed site for Channel 14 at New London is 159 kilometers (98.8 miles) from Milwaukee. However, as noted in the *Freeze Order*, the Commission will consider waiver requests for applicants which provide compelling reasons why the freeze should not apply to their particular situations or class of station. We request comment as to why the Commission should, or should not, grant petitioner's request for waiver in this instance. We note however, that we remain concerned that the relocating of Channel 14 could limit our ability to identify a new channel for all broadcasters eligible for an advanced television channel. Accordingly, we will consider the needs of our advanced television allotment process in deciding whether to permit the relocation of Channel 14.

9. Television Channel 14 is adjacent to spectrum allocated to various land mobile radio services, including public safety services. Licensees who seek to increase the effective radiated power or change the transmitting location of an existing Channel 14 station are subject to special provisions of §73.687(e)(3) and (4) regarding the protection of adjacent land mobile facilities.[7]

10. Finally, we request petitioner to submit any additional information as to the overall public interest benefits that would flow from grant of this proposal.

11. Channel 14 can be reallotted from Suring, Wisconsin to Appleton, Wisconsin, with a minus offset[8] consistent with the minimum distance separation requirements of the Commission's Rules with a site restriction of 24.9 kilometers (15.5 miles) north.[9] Alternatively, Suring Channel

[6] The television allotment priorities are (1) to provide at least one television service to all parts of the United States, (2) to provide each community with at least one television broadcast station, (3) to provide a choice of at least two television services to all parts of the United States, (4) to provide each community with at least two television broadcast stations, and (5) to assign any remaining channels to communities based on population, geographic location, and the number of television services available to the community from stations located in other communities. *Sixth Report and Order*, 41 FCC 148, 167 (1952).

[7] *See In the Matter of Resolution of Interference Between UHF Channels 14 and Adjacent-Channel Land Mobile Operations* 6 FCC Rcd 5148 (1991), *recon. pending*.

[8] "A station with a 'plus' or 'minus' offset is required to operate with its carrier frequency 10 kHz above or below the normal carrier frequency. A different offset between two television stations reduces interference makes possible the separation criteria set forth in our Rules." *Crandon, Wisconsin*, 3 FCC Rcd 6765 n.1 (1988).

[9] The coordinates for Channel 14 at Appleton are North Latitude 44-29-00 and West Longitude 88-22-30.

14 can be reallotted to New London, Wisconsin, with a minus offset consistent with the minimum distance separation requirements of the Commission's Rules with a site restriction of 9.3 kilometers (5.8 miles) east.[10] Either proposal requires a change in the offset for vacant Channel 14, Joliet, Illinois, from a minus to a plus offset.[11] Since Appleton and New London are located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for these allotments. In addition, we propose to modify the authorization of Station WSCO(TV) to specify Appleton or New London in lieu of Suring pursuant to Commission Rule 1.420(i).

12. Accordingly, we seek comments on the proposal to amend the Television Table of Allotments, Section 73.606(b) of the Commission's Rules, with respect to the following communities:

Option 1

	Channel No.	
City	Present	Proposed
Suring, Wisconsin	14-	-
Appleton, Wisconsin	32+	14-, 32+
Joliet, Illinois	14-	14+

Option 2

	Channel No.	
City	Present	Proposed
Suring, Wisconsin	14-	-
New London, Wisconsin	-	14-
Joliet, Illinois	14-	14+

13. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

14. Interested parties may file comments on or before **March 1, 1993,** and reply comments on or before **March 16, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows: James R. Bayes, Esq., Wayne D. Johnsen, Esq., Wiley Rein & Fielding, 1776 K Street, N.W., Washington, D.C. 20006.

15. Furthermore, IT IS ORDERED that the Secretary of the Commission SHALL SEND a copy of this *Notice of Proposed Rule Making* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to: David D. Oxenford, Esq. and John K. Hane, Esq., Fisher, Wayland, Cooper and Leader, 1255 23rd Street, N.W., Suite 800, Washington, D.C. 20037-1125.

16. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the Television Table of Allotments, Section 73.606(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

17. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be ex-

[10] Proposed coordinates for Channel 14 at New London are North Latitude 44-22-10 and West Longitude 88-37-40.

[11] The change in offset does not require a change in the reference coordinates for Joliet Channel 14, which are North Latitude 41-31-40 and West Longitude 88-04-55.

pected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-300

In the Matter of

Amendment of Section 73.202(b), RM-8138
Table of Allotments,
FM Broadcast Stations.
(Ketchum, Idaho)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 9, 1992; Released: January 8, 1993

Comment Date: March 1, 1993
Reply Comment Date: March 16, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Idaho Broadcasting Consortium, Inc. ("petitioner"), requesting the substitution of Channel 284C for Channel 284A at Ketchum, Idaho, and modification of the license for Station KYAA(FM) to specify operation on the higher class channel.

2. We believe the public interest would be served by proposing the substitution of Channel 284C for Channel 284A at Ketchum since it could provide the community with a wide coverage area FM service. Channel 284C can be allotted at Ketchum in compliance with the Commission's minimum distance separation requirements at its construction permit site.[1] In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 284C at Ketchum or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Ketchum, Idaho	284A	284C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 1, 1993,** and reply comments on or before **March 16, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lee W. Shubert
Dawn M. Sciarrino
Haley, Bader & Potts
4350 North Fairfax Drive, Suite 900
Arlington, VA 22203-1633
(Attorneys for Idaho Broadcasting
Consortium, Inc.)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding hash)been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 284C at Ketchum are North Latitude 43-38-36 and West Longitude 114-23-49.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-301

In the Matter of

Amendment of Section 73.202(b), RM-8136
Table of Allotments,
FM Broadcast Stations.
(Henderson, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 9, 1992; Released: January 8, 1993

Comment Date: March 1, 1993
Reply Comment Date: March 16, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Dean Broadcasting, Inc. ("petitioner"), licensee of Station KGRI-FM, Henderson, Texas, requesting the substitution of Channel 260C3 for Channel 260A at Henderson and modification of Station KGRI-FM's license to specify operation on the higher powered channel. Petitioner states it will apply for Channel 260C3, if allotted to Henderson.

2. We believe the public interest would be served by proposing the substitution of Channel 260C3 for Channel 260A at Henderson, Texas, since it could provide the community with a wide area FM service. Channel 260C3 can be allotted to Henderson in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.3 kilometers (10.2 miles) southwest in order to avoid a short-spacing to the reference coordinates for vacant but applied for Channel 259C2, Shreveport, Louisiana.[1] As requested, we also propose to modify petitioner's license for Station KGRI-FM to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 260C3 at Henderson or require the petitioner to demonstrate the availability of an additional equivalent class channel.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Henderson, Texas	260A	260C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 1, 1993,** and reply comments on or before **March 16, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Donald E. Martin, Esq.
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served

[1] The coordinates for Channel 260C3 are North Latitude 32-01-20 and West Longitude 94-52-58. We are proposing coordinates different than those requested by the petitioner in order to provide protection to the reference coordinates of Channel 259C2 at Shreveport. We note that Sungroup Broadcasting of Louisiana, licensee of Station KMJJ-FM, Channel 261A, Shreveport, Louisiana, has filed an application (File No. BPH-920730MC) for Channel 259C2 at Shreveport, at coordinates that are fully spaced to the site specified by petitioner. However, until final action has been adopted with regards to Sungroup's application, we will protect the coordinates at which Channel 259C2 was originally allotted.

on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-101

In the Matter of

Treatment of Local
Exchange Carrier Tariffs
Implementing Statement of
Financial Accounting Standards,
"Employers Accounting for
Postretirement Benefits
Other Than Pensions"

Bell Atlantic Tariff F.C.C. No. 1	Transmittal Nos. 497, 536
US West Communications, Inc. Tariff F.C.C. Nos. 1 and 4	Transmittal No. 246
Pacific Bell Tariff F.C.C. No. 128	Transmittal No. 1579

ORDER

Adopted: December 30, 1992; Released: December 31, 1992

By the Chief, Common Carrier Bureau:

1. Bell Atlantic Telephone Companies (Bell Atlantic), US West Communications, Inc. (US West), and Pacific Bell (Pac Bell) filed the above-captioned tariffs to increase the rate limits set under the price cap plan, and their rates, in order to recognize an accounting change for postretirement employee benefits other than pensions, such as medical benefits. The accounting change is referred to as SFAS-106.[1] On April 29, 1992, the Common Carrier Bureau suspended the Bell Atlantic and US West tariffs for five months[2] and designated for investigation issues arising from the carrier's claim that the incremental change in accounting costs should be treated as a one-time exogenous cost change under price caps. The five month suspension of US West's tariff expires on December 31, 1992, and the tariff transmittals of Bell Atlantic and Pac Bell are currently scheduled to take effect on January 1, 1993.

2. The Commission has not yet completed its investigation of the issues raised by these tariffs. In order to protect customers in the event the rate increases are found to be unlawful in that investigation, we are accordingly adopting an accounting order for all three carriers, under which they are required to keep accurate account of all amounts received by reason of the increased charges, and by whom and in whose behalf such amounts are paid. We are also suspending the tariff transmittals of Bell Atlantic and Pac Bell for one day.

3. ACCORDINGLY, IT IS ORDERED, pursuant to Section 204(a)(1) of the Communications Act, 47 U.S.C. Section 204(a)(1), and Section 0.291 of the Commission's Rules, 47 C.F.R. Section 0.291, the tariff revisions contained in Bell Atlantic Telephone Companies' Transmittal No. 536 and Pacific Bell Transmittal No. 1579 ARE SUSPENDED FOR ONE DAY.

4. IT IS FURTHER ORDERED that Bell Atlantic and Pacific Bell SHALL FILE tariff revisions reflecting this suspension no later than December 31, 1992. For this purpose, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. Sections 61.58 and 61.59, and assign Special Permission No. 92-1001.

5. IT IS FURTHER ORDERED, that Bell Atlantic, for its Transmittal No. 536 and all subsequent transmittals affecting the charges in its Tariff F.C.C. No. 1, Pacific Bell for its Transmittal No. 1579 and all subsequent transmittals affecting the charges in its Tariff F.C.C. No. 128, and US West Communications, Inc. for its Transmittal No. 246 and all subsequent transmittals affecting the charges in its Tariff F.C.C. Nos. 1 and 4 SHALL KEEP ACCURATE ACCOUNTS of all monies received by reason of increased charges, specifying by whom and in whose behalf such amounts were paid.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl Tritt
Chief, Common Carrier Bureau

[1] *See* Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 497 (Filed Feb. 28, 1992); US West Communications, Inc. Tariff F.C.C. Nos. 1 and 4, Transmittal No. 246 (Filed Apr. 3, 1992); Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1579 (Filed Apr. 16, 1992).

Effective November 25, under Transmittal No. 534, Bell Atlantic withdrew the material filed under Transmittal No. 497. Subsequently, on December 4, 1992, under Transmittal No. 536, Bell Atlantic refiled the same material it had previously withdrawn, with a scheduled effective date of January 1, 1993.

[2] The Common Carrier Bureau stated that since it anticipated that the issues raised for investigation of these tariffs would be resolved prior to the January 1, 1993 effective date of the Pac Bell tariff, it did not suspend the Pac Bell tariff. Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, 7 FCC Rcd 2724, n.3 (Com. Car. Bur. 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-287

In the Matter of

US West Communications
Petition for Authority to Continue
to Charge Premium Rates for Access
Service After 1992

ORDER

Adopted: December 31, 1992; Released: December 31, 1992

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. US West seeks authority to continue to charge after 1992 premium rates for the interstate access services it provides using alternative technologies at 18 small end offices which collectively serve 11,918 access lines. The terms "alternative" or "adjunct technologies" refer to that class of hardware or software additions or modifications which are made to step-by-step or electromechanical end offices, or access tandems, in lieu of switch replacement with electronic switches. The use of alternate technologies to provide feature group D service permits the offering of this service from certain older end office switches, subject to restrictions on service feature availability as compared to new electronic offices.[1]

2. In the Commission's investigation of the use of these technologies,[2] the Commission determined that use of alternate technologies through 1992 was a reasonable practice, but that permanent use could result in an unreasonable disadvantage to certain persons and localities because of the negative impact their use would have on quality of service. Thus, the Commission required the BOCs and GTOC to provide equal access to end offices after December 31, 1992 or charge rates lower than premium rates for access provided through adjunct technologies beyond that date.[3]

3. The Commission also recognized that the use of alternate technologies beyond 1992 might be justified in some cases. Moreover, the Commission stated that waiver of the less-than-premium rate requirement would be possible in such cases so long as the carrier shows that conversion to full equal access would be "clearly uneconomical" in an end office.[4]

II. THE PLEADINGS

4. In support of its request, US West contends that the replacement dates of the 18 end offices cannot realistically be accelerated[5] because sixteen are located in four different states where US West is currently engaged in a rural modernization plan that has been generally approved by the state commissions. *Id.* at 4. In these states, Arizona, Iowa, Montana and Utah, US West asserts that it is scheduled to replace over 300 electromechanical offices and upgrade the serving interoffice facilities to optical fiber or digital radio by the end of 1995. US West asserts that it will replace the remaining two offices, which are located in Wyoming and collectively serve 656 access lines, before the end of 1995. According to US West, it will cost nearly $5 million to modernize the switching and transmission facilities in Wyoming. *Id.* at 5.

5. US West concludes that since it has a plan to replace the offices in question, the Commission's discount rate "incentive" is unnecessary. *Id.* at 6; *see also* US West Reply at 4. In fact, US West maintains, imposition of discounts under these circumstances would be counterproductive, particularly given the "minuscule" number of access lines involved. US West Petition at 6.

6. United States Telephone Association (USTA) filed comments in support of US West's petition. USTA asserts that US West has acted progressively and in good faith in regard to end office conversion. USTA comments at 2. Further, USTA supports US West's replacement schedule and adds that a more rapid change in Wyoming would cost more than $7600 per access line. *Id.* USTA concludes that the additional costs of changing from and then back to FGD rates would likely consume much of any perceived gain. *Id.* at 3.

7. MCI objects to paying premium rates after 1992 for what it characterizes as the "inferior access services US West provides by means of adjunct devices." MCI Opposition at 2-3; *see also* MCI Reply at 4. Providing access with adjunct devices, MCI contends, is substantially inferior to FGD service. MCI Opposition at 4. Specifically, MCI contends, interexchange services are degraded because alternate technologies offer fewer service options. Also, MCI states, the Commission has held that the post-dial delay associated with the use of alternate technologies is excessive. MCI concludes that access service that lacks fundamental network functions and features should not qualify for premium rates. *Id.*

8. MCI further argues that US West has failed to justify its request since it has not shown that installation of an electronic switch would clearly be uneconomical. *Id.* at 5. Since it was US West's decision to use alternate methods of providing access rather than implementing FGD service using electronic switches, MCI contends, US West should bear the cost of its business decisions not to convert to electronic technologies by the end of 1992. *Id.* Finally, MCI proposes that the parties affected by these services enter into and conclude good-faith negotiations concerning the proper level of access payments. *Id.* at 7. *See Also* MCI

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[1] *See* Southwestern Bell Telephone Company, *et. al.*, MM (sic) Docket No. 88-287, 6 FCC Rcd 3760, 3781 n.1, 3761 (1991) (*Alternate Technologies Order*).

[2] *See generally, Alternate Technologies Order, supra.*

[3] *Alternate Technologies Order* at 3761, 3779-80.

[4] *Alternate Technologies Order* at 3780. The Order did not address whether a waiver would be justified if a carrier wanted to delay conversion of an end office rather than not convert an office at all.

[5] According to US West, 10 of the 18 offices are scheduled for replacement in 1993. *See* US West Petition at 3-4.

Reply at 5. MCI states that the relatively small number of access lines should make such negotiations less difficult. MCI Opposition at 8.

9. In reply, US West states that ten of the eighteen offices which will be replaced in 1993 serve two-thirds of the remaining access lines; the remaining eight will be replaced before the end of 1995. US West Reply at 1-2. In addition, US West repeats that most of the offices are being replaced as part of state-wide modernization programs designed to upgrade switching and facilities based on service requirements, market needs, state regulatory commission negotiations and US West work force capabilities. *Id.* at 4.[6] US West contends that this Plan includes replacement of the remaining offices utilizing alternative technologies and conversion of the remaining 11,918 access lines fits into the overall plan. US West Letter at 1.

10. According to US West, the 18 end offices have a total replacement cost of $16.6 million. US West states that it would incur project cancellation fees ranging from 10 percent to 80 percent if it cancels or reschedules construction of these facilities now. In addition, US West asserts, construction for the offices scheduled to be replaced in 1993 has already begun. *Id.* Thus, US West contends, conditions of planning make conversions by year end 1992 impractical or infeasible. *Id.* at 2.

11. US West also asserts that of the 30 interexchange carriers currently using US West's access services from the 18 end offices in question, MCI is the only one that opposes US West's petition. Further, US West contends, MCI is unable to recite a single customer complaint about FGD service being provided by these technologies. US West Reply at 1, 7.

12. MCI replies that if US West does not consider it prudent to expend resources at this time to improve the facilities in the 18 offices, MCI should not be obligated to disburse premium dollars for the access services furnished over these facilities. MCI Reply at 4. MCI also contends that US West failed to show that changing rates temporarily is not cost justified. *Id.* at 5.

III. DISCUSSION

13. Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3, provides that waiver petitions may be granted if "good cause therefor is shown." Upon review of US West's petition and the related pleadings, we conclude that US West has shown good cause for waiver of this requirement. The general rule, articulated in the *Alternate Technologies Order* is that carriers providing access service through use of adjunct technologies after 1992, charge a rate lower than that charged for premium access. As the courts have pointed out, general rules can be waived where particular facts would make strict compliance inconsistent with the public interest.[7] Thus, the Commission in the *Alternate Technologies Order* stated that a carrier could obtain a waiver of the requirements of that order.[8] Here, the carrier indicates that it has spent in excess of $400 million over the past 30 months replacing over 300 electromechanical switches as part of its overall rural modernization program.[9] This program, US West represents, includes conversion of its 18 nonconforming end offices. US West also represents that by the end of 1992, it will have replaced 79 percent of the end offices and 94 percent of the access lines that were once supported by alternate equal access technologies.

14. According to US West, the 18 end offices which are not scheduled to be converted before the end of 1992 collectively service fewer than 12,000 access lines and have a total replacement cost of $16.6 million. US West also asserts that almost $5 million of this amount will be required to effect the conversion in Wyoming, where two end offices service fewer than 700 access lines. US West has now filed a replacement schedule with the Commission which indicates that 10 of the 18 unconverted end offices, which collectively serve two-thirds of the remaining access lines, will be replaced in 1993, and the remaining 8 will be converted by 1995.[10] On the whole, this conversion schedule appears to be a reasonable means of achieving conversion of US West's nonconforming end offices at a reasonable cost. Thus, we believe a decision to grant US West's waiver would not undermine the equal access conversion process since the majority of US West's nonconforming end offices have already been converted and most of those remaining will be converted by the end of 1993. Further, an inordinate amount of time and Commission resources would be consumed in determining an alternate rate which under these circumstances would be in effect only temporarily.[11]

15. On balance, we believe that good cause exists to waive the requirements of the *Alternate Technologies Order* and therefore, we grant the instant waiver.

IV. ORDERING CLAUSE

16. Accordingly, IT IS ORDERED that the petition for authority to continue to charge premium rates after 1992 for its access service filed by US West Communications, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[6] *See also* Letter to Gregory Vogt, Chief, Tariff Division from Janis Stahlhut, Director, Federal Relations, US West at 1 (November 12, 1992).

[7] *See* WAIT Radio v. FCC, 418 F.2d. 1153, 1159 (D.C.Cir. 1969); *See also* 47 C.F.R. §1.3.

[8] As noted previously, to obtain a waiver of the general rule set forth in the *Alternate Technologies Order*, a carrier must show that conversion to full equal access would be clearly uneconomical. This standard, however, appears to apply only where the carrier fails to convert to equal access altogether, rather than where, as here, the carrier proposes to delay such conversion for a relatively short period of time. Thus, we believe the general waiver set forth in *WAIT Radio, supra*, best applies in the instant circumstance.

[9] US West Reply at 5.

[10] *See* US West Petition at 3-4.

[11] We note previous instances in which the Commission was engaged in a laborious and protracted process to determine a just and reasonable rate differential for access service: In the Matter of MTS and WATS Market Structure, CC Docket 78-72 (Phase I) 97 FCC Rcd 682, 723-35 and In the Matter of MTS and WATS Market Structure, CC Docket 78-72 (Phase I) 97 FCC Rcd 834 (1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-287

In the Matter of

GTE Service Corporation — Transmittal No. 7
Use of Alternate Technologies
for Equal Access

ORDER

Adopted: December 30, 1992; Released: December 31, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On July 1, 1992, GTE Service Corporation (GTE) submitted a letter to the Commission stating that 36 of its end offices, which had been acquired by GTE as a result of its 1991 merger with Contel, would continue to offer equal access using alternate technologies after December 31, 1992. GTE requested that it be permitted to charge premium rates for three of these offices which GTE stated would be converted in 1993, on the grounds that it would "avoid the confusion and cost burden of changing prices and billing twice in less than a year." Attachment A to GTE's letter listed the name and location of the non-conforming end offices, but did not include a replacement schedule.

2. On December 19, 1992, GTE Service Corporation (GTE) filed a petition for authority to continue to charge premium rates after December 31, 1992, for all 36 end offices using alternate equal access technology in Iowa and Indiana, serving 19,199 and 10,932 access lines respectively. GTE's petition sets forth specific reasons for the delay in conversion and attempts to justify its request to charge premium rates after December 1992.

3. In order to allow interested parties sufficient time to consider and respond to GTE's petition, we will permit GTE to continue charging its current rates for access service for the next 90 days. Oppositions to GTE's petition should be filed no later than **January 11, 1993.** GTE may file a reply no later than **January 15, 1993.**

4. Accordingly, pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, GTE Service Corporation is hereby authorized to continue charging its current rates for access service until **April 2, 1993.**

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-633

In re Applications of

CENTRAL FLORIDA COMMUNICATIONS GROUP, INC.	File No. BPH-880505MS
HOLLY HILL RADIO PARTNERS	File No. BPH-880505NQ
WALO BROADCASTING LIMITED PARTNERSHIP	File No. BPH-880505OZ
MICHELLE N. TERZYNSKI	File No. BPH-880505PL

For Construction Permit
for New FM Station on Channel 277A,
Holly Hill, Florida

ORDER

Adopted: December 17, 1992; Released: January 8, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

Board Member GREENE:

1. The *Initial Decision* of Administrative Law Judge Richard L. Sippel, 7 FCC Rcd 6773 (1992), in the above-captioned proceeding was released on October 26, 1992. Holly Hill Radio Partners and WALO Broadcasting Limited Partnership have failed to file exceptions to this decision. Thus, their applications will be dismissed for failure to prosecute pursuant to 47 C.F.R. § 1.276(f).

2. ACCORDINGLY, IT IS ORDERED That the applications of Holly Hill Radio Partners (File No. BPH-880505NQ) and WALO Broadcasting Limited Partnership (File No. BPH-880505OZ) ARE DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-265

In the Matter of

Implementation of Sections 12 and 19
of the Cable Television Consumer
Protection and Competition Act of 1992

Development of Competition and
Diversity in Video Programming
Distribution and Carriage

NOTICE OF PROPOSED RULE MAKING

Adopted: December 10, 1992; Released: December 24, 1992

Comment date: January 25, 1993
Reply comment date: February 16, 1993

By the Commission:

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Appendix A: Sections 12 and 19 of the 1992 Cable Act
Appendix B: Initial Regulatory Flexibility Analysis

I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[1] This *Notice of Proposed Rule Making* seeks comment on the Commission's implementation of Sections 19 and 12 of the 1992 Cable Act, which amend the Communications Act of 1934 by adding new Sections 628 and 616, respectively.[2] First, the *Notice* addresses the provisions of Section 628 regarding unfair or discriminatory practices in the sale of cable programming. Section 628 is intended to foster the development of competition to traditional cable systems by prescribing regulations that govern the access by competing multichannel systems to cable programming services. The *Notice* then addresses the provisions of Section 616 that require the Commission to adopt regulations that govern agreements between cable systems -- or other multichannel video programming distributors -- and the programming services they distribute. These regulations on programming carriage agreements are intended to prevent cable systems from taking undue advantage of programming vendors through various practices, including coercing the vendors to exchange ownership interests or exclusive distribution rights in exchange for carriage. In this proceeding, as we develop regulations pertaining to program access and carriage agreements, we seek to serve the congressional intent to prohibit unfair or anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive "marketplace.

II. BACKGROUND

2. The 1992 Cable Act and its legislative history[3] indicate that Congress has found that the cable television industry is highly concentrated.[4] Congress also has concluded that excessive concentration could inhibit the entry of new programmers into the cable industry, thus reducing the number of media voices available to consumers.[5] Moreover, Congress has found that the cable industry has become vertically integrated in that cable systems and programmers are often commonly owned.[6] The House Report notes that,

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. (1992).

[2] For the convenience of commenting parties, the specific statutory provisions are attached in Appendix A.

[3] House Committee on Energy and Commerce, H.R. Rep. No. 102-628 (House Report), 102d Cong., 2d Sess. (1992); Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 102-92 (Senate Report), 102d Cong., 1st Sess. (1991); House Committee on Energy and Commerce, H.R. Rep. No. 102-862 (Conference Report), 102d Cong., 2d Sess. (1992), reprinted at Cong. Rec. H 8308 (Sept. 14, 1992).

[4] For example, the House Report observes that the largest multiple system operator (MSO), TCI, controls access to almost 25 percent of the nation's cable subscribers. House Report at 42.

[5] 1992 Cable Act, Section 2(a)(4).

[6] For example, the Senate Report notes that Viacom owns programming services such as MTV, Showtime and Nickelodeon, and also owns Viacom Cable Systems, and that TCI has financial interests in American Movie Classics, the Discovery Channel, QVC and Encore. *See* Senate Report at 25.

according to the National Cable Television Association (NCTA), 39 of the 68 nationally delivered cable networks have some ownership affiliation with cable operators.[7]

3. In drafting the 1992 Cable Act, Congress was concerned that increased horizontal concentration and vertical integration in the cable industry have created an imbalance of power, both between cable operators and program vendors and between cable operators and their multichannel competitors (*i.e.*, other cable systems, direct broadcast satellite (DBS) providers, satellite master antenna television (SMATV) systems, wireless cable operators, *etc.*). Therefore, Congress has concluded that vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel programming distributors.[8]

4. Congress has also concluded that vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems. As a result, cable operators or programmers that compete with the vertically integrated entities may suffer harm to the extent that they do not receive such favorable terms.[9] Congress also has found that non-affiliated programmers are sometimes required to grant cable operators exclusive rights to programming, a financial interest in the programming, or some other additional consideration in return for carriage on the cable system.[10]

5. While the 1992 Cable Act establishes provisions governing program access and carriage agreements, Congress also recognized that vertical integration of cable systems and programming vendors, as well as horizontal concentration in the industry, can provide certain benefits to the public. Specifically, the legislative history shows that vertical integration in the cable industry has contributed to enhancing development of innovative programming ventures through efficiencies in financing and by compensating cable systems for assuming the risk associated with launching new programming services.[11]

III. PROGRAMMING ACCESS ISSUES

A. General Program Access Issues in Section 628 of the Communications Act

6. Section 19 of the 1992 Cable Act amends Title VI of the Communications Act of 1934 by creating Section 628, which was promulgated for the purpose of: (1) promoting the public interest by increasing competition and diversity in the multichannel video programming market; (2) increasing the availability of satellite cable and broadcast programming to persons in rural and other areas that are not currently able to receive such programming; and (3) encouraging the development of communications technologies.[12] To accomplish these purposes, Section 628(b) makes it unlawful for a "cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor" to engage in "unfair methods of competition or unfair or deceptive acts or practices" whose purpose or effect is to "hinder significantly" or to "prevent" delivery of programming by multichannel video programming distributors.[13] The law provides greater specificity in the subsections that follow and instructs the Commission to adopt implementing regulations "to specify particular conduct that is prohibited" under this section. At the outset, in developing a proper interpretation of this provision and in implementing the regulations required, we emphasize the importance of arriving at a correct understanding of the Congressional objectives. Accordingly, this is the first matter on which we seek comment.

7. From the structure of Section 628 as well as the legislative history, it appears that Congress's concerns were particularly focused on vertical ownership relationships in the cable industry and the extent to which they may restrict the availability and increase the cost of programming.[14] At the same time, Congress recognized that common ownership of cable systems and programming suppliers can benefit the public. In particular, the legislative history shows that substantial investment by cable operators "stimulated the development of programming that was necessary to flesh out the promise of cable."[15] This Commission has also recognized that MSO investment has enabled certain programming services to remain in operation, while such investment and a ready subscriber base have also promoted the introduction of innovative pro-

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[7] House Report at 41.

[8] 1992 Cable Act, Section 2(a)(5). *See also* Senate Report at 24; House Report at 41-45. The legislative history shows testimony of practices that extend exclusive rights for TNT to certain distributors, while larger cable operators have obtained discounts for Turner programming that are unavailable to smaller multichannel video providers. *See* Senate Report at 26. In *Report* in MM Docket No. 89-600, 5 FCC Rcd 4962 (1990) (*1990 Cable Report*), the Commission similarly concluded that the cable television industry has become increasingly concentrated and vertically integrated, thus providing MSOs and vertically integrated cable operators the potential to pursue anticompetitive actions against programming services or competing multichannel providers. The *1990 Cable Report* also found anecdotal evidence that some have indeed used this potential anticompetitively. *See 1990 Cable Report* at 5006, 5008, and 5021.

[9] 1992 Cable Act, Section 2(a)(5).

[10] *See* Senate Report at 24; House Report at 42.

[11] *See* House Report at 41.

[12] 1992 Cable Act Section 628(a).

[13] Section 2 of the 1992 Cable Act amends Section 602 of the Communications Act to define "multichannel video programming distributor" as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." We note that the complete scope of this definition is unclear, and that this issue was raised in the *Notice* implementing the must-carry and retransmission consent provisions of the 1992 Cable Act. *See Notice of Proposed Rulemaking* in MM Docket No. 92-259, FCC 92-499, released November 19, 1992. Given that the current proceeding raises similar concerns, we seek comment similar to that solicited in the must-carry proceeding on the full scope of the definition of a "multichannel video programming distributor."

[14] *See* Senate Report at 24; House Report at 41-45.

[15] *See* Senate Report at 26-27.

gramming services focused upon narrow audiences.[16] Vertical integration also contributes to an enriched quality of existing programming services, given that a cable operator has a strong incentive to increase its penetration by making the programming that it offers more attractive to potential subscribers. Section 628, however, reflects a Congressional concern with the enhanced market power that can emanate from the integration of large MSOs with programming vendors. Specifically, firms that are vertically integrated could have incentives to favor their own affiliates and to unfairly discriminate against alternative distributors, which could restrain competition in program distribution.[17]

8. With respect to the intended objectives and scope of Section 628, we believe that the proscriptions pertaining to satellite cable programming vendors are apparently focused on practices that are pursued by vertically integrated entities. We seek comment on this interpretation, and on whether the section covers conduct beyond actions that are related to discriminatory incentives caused by vertical integration.[18] Also, given the section's emphasis on vertically integrated entities, we ask whether Section 628 is intended to require vertically integrated firms to conduct themselves in a manner similar to non-integrated firms, thereby minimizing the anticompetitive potential of integration. Alternatively, we ask whether the regulations should cause vertically integrated firms to function differently than non-integrated firms. In contrast to satellite cable programming vendors, the 1992 Cable Act appears to require that our implementing regulations should prevent all "satellite broadcast programming vendors," regardless of vertical relationships,[19] from pursuing unfair or deceptive actions that would unduly favor cable television systems as compared to other multichannel program outlets, such as MMDS, DBS, or home satellite dish systems. Specifically, it appears that such practices could involve attempts by satellite broadcast programming vendors to unfairly favor cable television systems as larger and more established customers. We, therefore, seek comment on appropriate implementing regulations pertaining to satellite broadcast programming vendors.[20]

9. In order to determine whether a cable operation is vertically integrated under the 1992 Cable Act, we must establish a threshold at which an ownership interest will be considered attributable. The Senate Report states that "[i]n determining what is an attributable interest, it is the intent of the Committee that the FCC use the attribution criteria set forth in 47 C.F.R. Section 73.3555 (notes) or other criteria the FCC may deem appropriate."[21] The Senate version of the programming access provisions was not adopted. The House version, which was adopted with amendments, uses the term "attributable interest" but does not define an attribution benchmark. Therefore, we seek comment on whether we should define "attributable interest" with reference to the attribution threshold generally applicable to the broadcasting industry. We note that the five-percent threshold for outstanding voting stock from the broadcast attribution standard has been followed in the cable-telco cross-ownership proceeding.[22] If the basic broadcast standard is used, should the single majority shareholder rule[23] and the other provisions of the broadcast attribution rules also apply?[24] As an alternative, we ask whether we should use some other attribution standard. Commenters should address the rationale underlying the attribution benchmarks adopted for broadcast ownership rules, and discuss the level of influence and control that need to be attributed in order to effectuate any rules adopted in this proceeding. Moreover, will an attribution benchmark by itself be sufficient to determine whether an entity actually controls another entity, or should the Commission establish behavioral guidelines to determine control irrespective of the attribution threshold? If so, what guidelines should be developed? In addition, should the Commission use the broadcast reporting requirement or some other standard to keep track of transfers of control of cable distributors and programmers over time?

10. Section 628 is limited to conduct "the purpose or effect [of which]...is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[25] We seek comment on how this component of the conduct that Section 628 would address, which is a critical threshold requirement under the statute, interacts with the remainder of Section 628 in proscribing specific practices or conduct. The plain language of Section 628(b) suggests that our regulations should only implicate practices that are both (i)

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[16] *See 1990 Cable Report* at 5009.

[17] The *1990 Cable Report* also found anecdotal evidence that some have used this ability in anticompetitive ways. *See 1990 Cable Report* at 5006, 5008, and 5021.

[18] We emphasize that subsections 628(c)(2)(A), (B), (C), and (D) specifically apply to a cable operator that is vertically integrated with a programming vendor, and attempts by such an entity to unduly influence the vendor's decision to sell, to discriminate in the conditions of sale of programming, or to establish exclusive contracts, respectively. We, however, observe that subsection 628(b), which addresses unfair practices, could apply more broadly to all "cable operators" rather than only to those vertically integrated operators that have an attributable programming interest as specified elsewhere in the Section.

[19] We note that Section 628(b) contains no vertical integration requirement for satellite broadcast programming vendors, but that Section 628(c)(2) could, at least in part, contain such a requirement for such vendors. We invite comment on the extent that we should read Section 628's focus on vertically integrated entities as extending such a limitation to satellite broadcast programming vendors as well. *See* paragraph 9, *infra*.

[20] We note that "satellite cable programming vendors" are actually selling rights to the programming involved. By comparison, "satellite broadcast programming vendors" are primarily selling a delivery or carrier service because the programming involved belongs to other parties and rights to its use are conveyed pursuant to "compulsory licensing" provisions of the Copyright Act. We request comment on whether the difference in the functions performed by these two types of programming vendors warrant the application of different criteria under Section 19.

[21] Senate Report at 78.

[22] *See Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking* in CC Docket No. 87-266, 7 FCC Rcd 5781, 5819 (1992).

[23] *See* 47 C.F.R. § 73.3555 Note 2(b).

[24] We note that we are currently considering revision of the broadcast attribution criteria. *See Notice of Proposed Rule Making* in MM Docket No. 92-51, 7 FCC Rcd 2654 (1992). In the event that we subsequently adopt new broadcast attribution criteria, we seek comment on whether these programming access rules should be revised accordingly.

[25] *See* 1992 Cable Act, Section 628(b).

"unfair," "deceptive," or "discriminatory," and (ii) could significantly hinder multichannel video programming distributors from providing satellite programming to consumers. This analysis is particularly significant to the extent that conduct might be considered unfair or discriminatory from the vantage point of a particular competitor, yet does not significantly harm competition in multichannel video programming distribution. As a result, the precise showing of harm that we should require to meet the statute's threshold requirement is a critical issue at the outset.[26] Thus, we seek comment on whether, when adjudicating complaints filed pursuant to the implementing regulations for Section 628, our analysis should consider harm to (i) consumers, as measured by the availability of, or quantity of, programming to consumers in the relevant market;[27] or (ii) to other multichannel video distributors in the relevant market; or (iii) to both consumers and other multichannel competitors. We seek comment on the proper interpretation of the statute and approach to implementing Section 628.

11. When evaluating the existence of "harm" under Section 628, we question what geographic market would be relevant to determining whether a proscribed behavior, such as an unjustified price differential by one program vendor between two programming distributors, causes anticompetitive harm in the market. As a general matter, how should we define the relevant market to the extent that the purposes of the prohibitions are intended to address conduct associated with vertical integration? For instance, should we measure harm within a local market or across different local markets?[28] Should our prohibitions generally apply in these local markets where an entity is in fact vertically integrated, *i.e.*, where it holds an attributable interest in the local cable system? We also seek comment on whether our standard for establishing "harm" -- or, more generally, our regulatory focus -- should exclude certain entities that lack significant anticompetitive potential due to their limited holdings or negligible market share as programming vendors or cable operators, such that the degree of vertical integration might be deemed *de minimis*.[29]

12. We also ask commenters to address how we can best accomplish Section 628's objectives in a manner that is faithful to the policy of Congress in the 1992 Cable Act to "rely on the marketplace, to the maximum extent feasible"[30] in promoting the availability of programming to the public through cable television and other video distribution media. Furthermore, we seek comment on whether our proposals for enhancing programming access -- including the proposed standards for determining discriminatory behavior as detailed below -- fulfill the Congressional intent as expressed in the 1992 Cable Act and the legislative history. We also solicit detailed allegations or evidence regarding unfair practices in distributing cable programming, as well as analysis of the potential consequences, to assist us in prescribing regulations governing particular conduct by cable operators and programming vendors.[31]

B. Specific Provisions of Section 628 of the Communications Act

13. Section 628 directs the Commission, at minimum, to prescribe specific regulations related to: (1) undue or improper influence by a cable operator on an affiliated satellite programming service in selling programming to unaffiliated multichannel video programming distribution services; (2) discrimination in the prices, terms, and conditions of sale or delivery of satellite programming among or between cable systems, other multichannel video distributors, or their agents; and (3) contractual exclusivity between cable operators and programming vendors in the sale of satellite programming.[32] In addition, the Commission is directed to establish an adjudicatory process for resolving disputes under Section 628, to report annually to Congress on the state of competition in the programming delivery, and to provide penalties for the filing of frivolous complaints. The following discussion focuses on issues for comment and proposed standards relating to specific concerns, such as "undue influence," price discrimination, and exclusive agreements.

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[26] For example, in order to evaluate a complaint involving an unjustified price differential, we ask commenters to identify factors that would indicate whether that unjustified price differential restrains any multichannel video program distributor from providing programming to subscribers or consumers. *See* discussion at paragraphs 16-25, *infra*. In particular, we seek comment on what evidence, if any, a complainant must provide to show that the price differential prevented the complainant from carrying this or any programming. We also ask what evidence, if any, a complainant must provide to show that unjustified discrimination in prices threatened the viability of the complainant's service because the resulting retail price of the service was too high to be attractive to consumers. We seek comment on what additional evidence would be relevant for determining the existence of anticompetitive harm.

[27] For example, with respect to the statutory prohibition against price discrimination, should we permit certain price differentials that may adversely affect multichannel competitors but cause no harm to consumers as measured by the availability of, or amount of, programming in the relevant market?

[28] For instance, we question whether a price differential between the rate that a programmer charges to a Tucson cable operator as compared to the rate charged to an Orlando cable operator causes any anticompetitive harm to the programming market in Orlando.

[29] Alternatively, we could exclude such entities through the analysis developed to determine whether a cable operator has an "attributable" interest in a program distributor. *See* paragraph 9, *supra*.

[30] *See* 1992 Cable Act, Section 2(b)(2).

[31] For instance, the Commission's *1990 Cable Report* cites examples of such favoritism by vertically integrated MSOs and programming services. *See* n.8, *supra*. Similarly, in the context of satellite retransmission of "superstation" and network programming, the Commission has found significant disparities in some of the prices charged by some carriers to home satellite dish distributors as compared to the prices charged to cable companies and other customers, and has concluded that some of the disparities are unjustified by the cost of providing service. *See Second Report* in Gen. Docket No. 89-88, 6 FCC Rcd 3312, 3317, 3321 (1991).

[32] We seek comment on whether Congress intended for the Commission to regulate any additional "unfair methods of competition or unfair or deceptive acts or practices" beyond those specified in Section 628(c). In particular, we ask whether other practices that are precluded by the various antitrust laws -- such as refusals to deal or "tying" arrangements -- are encompassed within the terms of Section 628 and warrant Commission regulation.

1. "Undue Influence" in Programming Distribution

14. Section 628(c)(2)(A) specifically directs the Commission to prohibit a cable operator that is vertically integrated with a satellite cable or satellite broadcast programming vendor from unduly or improperly influencing the vendor's decision to sell programming, or the prices or terms of sale of that programming, to an unaffiliated multichannel programming distributor.[33] We seek comment on the scope of activities or practices that we should consider "undue influence" by a cable operator upon such a programming vendor's decisions in selling programming. We also request comment on standards to apply in distinguishing practices that would constitute "undue influence" from other actions that may occur during the normal course of negotiations over the prices and conditions of programming sales. In addition, we ask how we may distinguish a cable operator's influence from a program vendor's independent conduct.

2. Discrimination in Programming Distribution

15. Section 628(c)(2)(B) requires the Commission to prohibit a programming vendor that is vertically integrated with a cable operator from discriminating in the prices, terms, and conditions of sale or delivery of satellite programming among or between cable systems, other multichannel video distributors, or their agents or buying groups.[34] We ask commenters to identify such practices that we should consider "discriminatory." To establish a discrimination standard, we seek specific evidence of discriminatory practices. Moreover, we seek comment on objective standards we may apply to distinguish discriminatory behavior -- with respect to pricing or other practices -- from legitimate business behavior that may occur in the video program distribution marketplace. Indeed, we are especially interested in examples of pricing practices for certain types of "programming that may employ a graduated pricing structure in order to facilitate broad program distribution. We also seek comment on specific situations in which a "uniform" pricing requirement could reduce the amount of programming available to subscribers.

16. We propose to determine whether certain programming vendors have pursued discriminatory actions against unaffiliated multichannel video distributors through the enforcement process for resolving complaints. This process requires a complainant to establish a *prima facie* case. We propose to resolve complaints of alleged instances of discrimination by using a system of presumptions that will be developed in this proceeding.[35] We also seek comment on whether we should utilize a two-step approach for evaluating allegations of discriminatory behavior that determines (i) whether price differentials are justifiable or "discriminatory" and (ii) if "discriminatory," whether the discriminatory practice has prevent or hindered significantly any multichannel video programming distributor from providing satellite programming to subscribers or consumers.[36] In this regard, we observe that the 1992 Cable Act appears to mandate that we consider the second component of this approach regarding the harm or hindrance resulting from an alleged discriminatory practice. We request that commenters address the merits of this approach as well as any system of presumptions it could incorporate.

17. *Issues related to justifiable price differentials.* Section 628 of the 1992 Cable Act states that programming vendors are not prohibited from (1) imposing reasonable requirements to account for differences in (a) creditworthiness, (b) offering of service, (c) financial stability, (d) character, and (e) technical quality; (2) accounting for actual and reasonable differences in the cost of creation, sale, or delivery of programming; and (3) accounting for economies of scale, cost savings, or other direct and legitimate economic benefits that are reasonably attributable to the number of subscribers served by the distributor. We seek comment on appropriate means of defining and measuring each of these factors, as well as on the types of data that we should require vendors to submit when relying on one or more of the factors to explain a price differential.[37] In particular, we ask commenters to suggest how we may distinguish and measure considerations of "creditworthiness," "financial stability," or other factors. For instance, we note that substantial cash flow may enable highly leveraged cable operators or other multichannel video distributors that are not otherwise "creditworthy" to become "financially stable." As for accounting for differences in costs, we recognize that delivery of an encrypted signal to individual home satellite dish (HSD) subscribers may be more expensive -- and less secure from piracy -- than delivery to the head end of a cable system. We seek information on the actual expense differentials of these two delivery modes. With respect to accounting for economies of scale and economic benefits reasonably attributable to size, we ask commenters to address the extent to which we should consider such factors beyond volume discounts for distributing programming. We also seek comment on how we may allow for differences in negotiations between a programming vendor and various multichannel video programming distributors, particularly as individual distributors might be willing to trade different terms for pricing changes. Also, because of the evolving nature of multichannel video services, we seek comment on an appropriate method of comparing the "technical quality" of various services, particularly in instances where only prototype models are available for a prospective service. In such cases, can program vendors be expected to enter distribution contracts, subject to conditions of a pre-determined level of objective technical quality in actual operation? In addition, we ask commenters to recommend any measures that we could employ as proxies for the various permissible causes of pricing differentials.

18. We also ask whether the statute permits the Commission to consider other economic factors that could cause price differences, including certain factors that are related to costs such as the volume of subscribers served or the direct costs of delivery, particularly if these aspects would increase the availability of programming. If so, we ask commenters to discuss any legitimate economic factors that are relevant and permissible under the statute. For instance, we seek comment on whether we should consider

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[33] Section 628(c)(2)(A).
[34] Section 628(c)(2)(B).
[35] *See* discussion at paragraph 38, *infra*.
[36] *See* discussion at paragraph 10, *supra*.
[37] With respect to the factor regarding the cost of "creation, sale, delivery or transmission" of programming, we particularly seek comment on the appropriate definition or type of costs that we should consider in evaluating a given price differential. *See* colloquy between Senators Kerry and Inouye found in *Congressional Record*, United States Senate, October 5, 1992, at S16671.

the extent that a programming service is sold with certain conditions or arrangements -- such as discounts for prepayment or for performance in marketing a service to subscribers, or an allowance for serving as a marketing agent -- for particular purchasers. We also ask commenters to address whether we can assign an appropriate magnitude of price differential that we could attribute to each factor to avoid resorting to an *ad hoc* justification in every case based on demonstrations of specific costs and circumstances.

19. We also seek to develop standards that we could apply in distinguishing between justifiable and discriminatory price differences, and we propose four options below for developing such objective standards. In addition to the issues and questions for comment that are presented with each option, we seek comment on any other standards that parties consider appropriate, including combinations of the following options.

20. *Option 1: Allowance for a "reasonable" price differential.* An initial standard for determining price discrimination could be derived from information gathered in this proceeding that would allow for a reasonable region of price differentials, depending upon the factors involved, within which we would rebuttably presume that a disparity in price is not discriminatory. Conversely, we would presume that a price differential of a magnitude that exceeds the established "reasonable region" is due to a discriminatory practice, but a showing of significant legitimate factors could rebut the presumption and cause us to consider the price difference acceptable. We believe that this approach is appropriate because of Section 628's explicit allowance for permissible factors for price differentials. Furthermore, to the extent that detailed data on the magnitude -- and the contributing factors -- of current differentials is available through the record and the enforcement process, we believe that a sufficiently broad region or allowance might reduce the administrative burden in resolving complaints. We seek comment both on the merits of such an approach relative to its potential burden for the Commission and the industry, as well as on an appropriate method for determining the parameters for the "reasonable region." Similarly, we ask commenters to address whether different thresholds are necessary for different technologies. Finally, in order to apply this approach, we seek comment on the nature of appropriate evidence and sufficient showings required to rebut the proposed presumptions related to price discrimination complaints.

21. *Option 2: Section 202 of the Communications Act.* Another option for defining "discrimination" as prohibited by Section 628 of the 1992 Cable Act is to use a standard similar to that developed to implement Section 202(a) of the Communications Act.[38] Under Section 202's standard, it is unlawful for a common carrier to engage in "unjust or unreasonable discrimination" in the provision of "like" communications services or to give any "unreasonable preference or advantage" to any person. In order to prove a violation of Section 202(a), a complainant must show that (1) the services in question are "like," (2) discrimination has occurred, and (3) such discrimination is not just or reasonable. Although we recognize that the entities that Congress intended to regulate in Section 628 of the 1992 Cable Act[39] would not be subject to the current provisions of Section 202 if they are not providing common carrier services,[40] the Commission could adopt a standard similar to Section 202 as a basis of a definition of discrimination in these new regulations. The Commission has used this standard in another proceeding to evaluate the existence and extent of discrimination in some aspects of the video programming distribution market.[41] Section 202 could offer the most appropriate standard because it addresses the term "unlawful discrimination" in providing communications services and, therefore, may be more relevant than other laws that do not specifically regulate telecommunications entities. We request comment on whether a standard similar to Section 202 of the Communications Act is an appropriate basis for judging discriminatory practices by vertically integrated cable operators and programming distributors in violation of Section 628. We also seek comment on suggested modifications to the standards used to enforce Section 202 that could facilitate its use as a discrimination standard in the context of the cable industry.

22. *Option 3: Antitrust standards.* Section 2 of the Clayton Act,[42] as amended by the Robinson-Patman Act,[43] prohibits any person engaged in commerce from discriminating "in price between different purchasers of commodities of like grade or quality...where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Under the Robinson-Patman Act, price differences may reflect either cost differences or changes in market conditions, thus allowing price differences by a firm where the lower price is intended to meet the equally low price of a competitor. In addition, under this analysis price discrimination is prohibited only where the effect may be to substantially lessen competition, and thus price differences that do not harm competition are permissible. Although the Robinson-Patman Act is generally applied to the pricing of goods or commodities rather than services, we believe that the 1992 Cable Act and the price discrimination provisions in Section 628 provide ample authority for the Commission to apply appropriate standards to program pricing for the cable industry and other multichannel competitors. We also recognize that questions have been raised regarding the Robinson-Patman Act's treatment of price discrimination cases and whether the standard may conflict with particular aspects of economic theory.[44] Accordingly, we seek

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[38] 47 U.S.C. § 202(a).

[39] This section applies to satellite cable programming vendors in which a cable operator has an attributable interest and to satellite broadcast programming vendors. *See* Section 628(c)(2)(B).

[40] *National Rural Telecommunications Cooperative v Southern Satellite Systems, Inc.*, 7 FCC Rcd 3213, 3214 (1992). *See also* H.R. Rep. No. 100-887, Part 2, 100th Cong. 2d. Sess. 13, 15 (1988).

[41] *See Notice of Inquiry* in Gen. Docket No. 89-88, 4 FCC Rcd 3883 (1989) (inquiring into the existence of discrimination in providing superstation and network station programming). *See also Report*, 5 FCC Rcd 523 (1989), and *Second Report*, 6 FCC Rcd 3312 (1991) (finding some disparities in prices charged by carriers to HSD as compared to other customers not justified by cost of providing service).

[42] *See* Clayton Act (1914), 15 U.S.C. §§ 12 *et. seq.*, 44.

[43] *See* Robinson-Patman Act (1936), 15 U.S.C. §§ 13, 13a, 13b, 21a.

[44] Illustrative discussions of the Robinson-Patman Act may be

comment on the extent that we may apply any of the related antitrust standards for price discrimination, or at least certain useful principles from the legislation.[45] We also ask commenters to consider whether an anticompetitive or "predatory" harm to competition in distributing programming is necessary in order for discrimination to occur. Given that the Robinson-Patman Act governs price differences for "goods of like grade or quality," we ask parties to comment on the how this standard might apply to cable programming. Similarly, if a particular programming service is sold under different conditions or arrangements for various customers, should sufficiently dissimilar conditions cause us to consider the services "distinct in grade or quality?"

23. *Option 4: Price comparisons as applied in other regulations.* We also request that commenters consider the applicability of principles for price comparison from other areas of federal regulation. For example, we question whether principles underlying the regulations and policies utilized by the International Trade Administration of the Commerce Department ("ITA") in anti-dumping analysis can be used to develop FCC regulations to implement Section 628 of the 1992 Cable Act.[46] In anti-dumping cases, U.S. product manufacturers challenge the pricing policies of foreign competitors, alleging that such foreign competitors charge prices that are below the market level in the U.S. in order to gain unfair competitive advantages over U.S. manufacturers. When evaluating such challenges, the ITA must compare the prices charged by the foreign manufacturer or distributor in the U.S. with the price charged in the manufacturer's home market, or a third country market if there are no home market sales, to determine whether the foreign company is engaging in unfair sales practices in the U.S. The ITA has developed detailed regulations that govern the price comparison process.[47]

24. Of course, we recognize that price discrimination complaints concerning video programming filed pursuant to Section 628 will raise allegations of unfair *over* pricing. Moreover, dumping cases involve pricing comparisons for manufactured goods, rather than services, which could thus involve costs relevant only to manufactured goods. However, the underlying principles used for ITA's price comparisons may remain applicable. For example, the ITA recognizes the need for various types of adjustments to the actual prices charged to allow fair comparisons between the pricing practices used by the foreign manufacturer in different markets. Thus, the ITA has established specific classes of pricing adjustments. These include adjustments for circumstances of sale (related to costs associated with differing credit terms, guarantees, warranties, commissions, and product-specific advertising directed at the purchasers of the product),[48] differences in quantities (volume discounts),[49] and level of trade (sales to wholesalers vs. sales to retailers).[50]

25. We seek comment on how we could apply any, or some combination, of the above options to develop regulations that (i) take into account relevant differences between the programming distributor's customers that are necessary to make fair pricing comparisons, and (ii) will enable the Commission to determine whether price differentials are legitimate or are the result of unfair practices.[51] Furthermore, we ask whether we could permit certain practices that cause price differentials given a showing that nonvertically integrated programming vendors also employ such a practice. We also seek comment on how to easily identify the appropriate video programming sales agreements that we should use to make the price comparisons necessary to resolve particular discrimination complaints. We also seek comment on how, to the extent possible, we can expedite the complaint process by developing standardized formulas, possibly utilizing objective values for the types of price adjustments contemplated above to minimize disputes between the parties relating to specific computations. Finally, in addition to distinguishing between reasonable price differentials and those that are discriminatory, we seek comment on what factors should be considered in the second component of any analysis that would consider whether a discriminatory price differential causes anticompetitive "harm" to multichannel programming distributors or consumers.

26. *Definition and treatment of buying groups.* Section 628(c)(2)(B) states that the 1992 Cable Act's protections against price discrimination apply to "agents" and "buying groups" of cable systems and other multichannel video distributors. We seek comment on issues relevant to defining the class of "agents" or "buying groups" covered by this provision. Are there any circumstances under which it would be appropriate to establish parameters for such protected "agents" or "groups"? For example, would it ever be appropriate to establish limits concerning the size of individual entities permitted to aggregate for purposes of purchasing programming under regulated pricing policies? It could be argued that we should require the cooperatives or associations who seek to experience the benefits of the law through price discounts -- or other favorable considerations -- based on size to agree to unitary treatment for other relevant purposes, such as billing, uniform contract provisions, or joint and several liability under a single program contract. Would such requirements be necessary to establish a level playing field for the regulated program-

found in symposia on the occasion of the Act's 50th Anniversary. *See The Antitrust Bulletin*, (Fall 1986); *Antitrust Law Journal* (April 1986).

[45] In considering the Robinson-Patman Act as a price discrimination standard for the cable industry, we believe that the "secondary-line injury" cases -- where certain customers of the discriminating firm experience harm due to paying input prices that are higher than another customer with whom they compete directly -- will raise the most useful issues. *See Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948). Conversely, "primary-line injury" cases that involve harm to direct competitors of a firm that discriminates by charging a predatory lower price to consumers in a restricted region may not be as useful. *See Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

[46] For a general overview of the fair value determination in antidumping cases, *see* Potts, Linda F. and Lyons, James M., *Trade Agreements Act: Administrative Policy and Practice in Antidumping Investigations*, 6 N.C.J Int'l L. and Com. Reg. 483-526 (Summer 1981).

[47] *See* 19 C.F.R. Part 353.

[48] *See* 19 C.F.R. § 353.15(a).

[49] *See* 19 C.F.R. § 353.14.

[50] *See* 19 C.F.R. § 353.19.

[51] We note that some of the adjustments defined in the antidumping area could provide models for developing the "reasonable region" for pricing discussed in Option 1. *See* paragraph 20, *supra*.

mers, by allowing them to gain economies from dealing with a single entity when multichannel distributors aggregate to avail themselves of any benefits derived pursuant to Section 628(c)(2)(B)?

27. *Implementation of Anti-discrimination Rules.* We note that the statute is silent concerning enforcement of anti-discrimination rules with respect to existing contracts. We tentatively conclude that any pricing policies or restrictions developed to implement Section 628 should not be applied retroactively against existing contracts. Commenters should provide us with analysis in this regard and address the extent that the Commission should implement Section 628 with respect to existing contracts. If we apply such policies prospectively only, waiting for existing contracts to expire, we may not achieve the results Congress envisioned from the requirements of Section 628 in a timely fashion given the long term nature of many programming agreements. Thus, we seek comment on whether we should establish a prospective deadline for compliance that will give parties to long-term programming contracts sufficient notice and time for renegotiation. If so, we seek comment on an appropriate compliance deadline for existing contracts. We also seek comment on the current duration of existing programming contracts, so we may gauge the practical effects of any proposed deadline. In addition, we seek comment on whether we should require that any renewals of existing contracts subsequent to the adoption of this *Notice* comply with the new rules, or whether we should require compliance only in contracts signed after the effective date of any rules we adopt. We also seek comment on whether parties to contracts, or negotiations, that are subject to our new rules may base a claim of discrimination on comparisons with contracts that predate our rules, or rather, only other contracts entered into under our new rules.

3. Exclusive Contracts

28. Another statutory provision aimed at promoting competition and increased access to video programming is the requirement contained in Section 628(c)(2)(C) that the Commission develop rules that:

> prohibit practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or a satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section....[52]

Similarly, Section 628(c)(2)(D) requires the Commission to prohibit exclusive contracts in areas "served by a cable operator" unless the Commission determines that the exclusive contract is in the public interest pursuant to Section 4628(c)(4). We seek comment on whether the lack of reference to the public interest finding of Section 628(c)(4) for contracts in areas "not served by a cable operator" means that Section 628(c)(2)(C) makes exclusive contracts in such areas a *per se* violation.

29. In implementing these provisions, we first seek comment on the appropriate determination of whether an area is served by a cable operator. The Conference Report states, "[f]or purposes of this section, the conferees intend that an area 'served' by a cable system be defined as an area actually passed by a cable system and which can be connected for a standard connection fee."[53] How should we define "area"? The language in the Conference Report suggests that this should be a local market determination related to a particular cable system. Alternative multichannel video program distributors, however, may serve a somewhat different market than an individual cable operator. Thus, we seek comment on the appropriate definition of "area" for purposes of this provision.

30. We note that Section 628(c)(2)(C) prohibits "practices, understandings, arrangements and activities, *including exclusive contracts*" (emphasis added) in areas not served by a cable operator, while Section 628(c)(2)(D) only prohibits "exclusive contracts" (unless deemed to be in the public interest) in areas served by a cable operator. We ask commenters to consider the significance of this distinction, as well as how we might identify other "practices, understandings, arrangements and activities" that should be prohibited pursuant to Section 628(c)(2)(C).

31. In our *1990 Cable Report*, we noted various types of contractual restrictions on program access that apparently are used in the industry, such as (i) prohibitions against or restrictions on a multichannel video programming vendor's distribution into areas served by a wired cable operator, (*i.e.*, a provision that a programming vendor may not provide programming to its customers located within a wired cable operator's service area); (ii) requirements to renegotiate agreements (*i.e.*, between programmers and wireless cable operators) once the multichannel distributor reached a stated penetration level; and (iii) time-delay requirements (*i.e.*, a requirement that an MMDS distributor not air certain programming until a specified time after that programming has been aired by another distributor, such as a wired cable operator).[54] Did Congress intend that such practices be prohibited when adopting Section 628(c)(2)(C)? Are there other similar practices that restrict access to programming that should be prohibited pursuant to that section?

32. In our *1990 Cable Report*, we also noted that programming vendors sometimes required that a multichannel competitor purchase programming from a local cable operator to whom the programming vendor had given sub-distribution rights for its franchise area.[55] While such agreements do not necessarily "prevent" another multichannel video programming distributor from obtaining programming, they create the potential for disparate, and

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[52] 47 U.S.C. § 628(c)(2)(C).
[53] *See* Conference Report No. 102-862 at 93.
[54] *See 1990 Cable Report* at 5021.
[55] *Id.*

perhaps unfair, access treatment. What limits, if any, can and should be imposed on such subdistribution arrangements?

33. We also seek comment on what data should be required to demonstrate that an exclusive contract in violation of these provisions has been made. For administrative reasons, we do not believe that it would be practical to require prior approval of exclusive arrangements. Thus, we propose to enforce the regulations adopted pursuant to this Section through the complaint process, and we seek comments on the merits of this approach. If we are nonetheless urged to require prior approval of exclusive agreements, however, we seek comment on how to develop practical, expeditious procedures for evaluating requests for approval of exclusive agreements. For example, how will a multichannel competitor establish the existence of an "exclusive" contract if it does not have access to the contract? What if the contract is not written? What will be required to establish a *prima facie* case that any exclusivity "practice, understanding, arrangement" exists? How can a program distributor likely to be aggrieved by such practices obtain the evidence necessary to substantiate a complaint to the Commission?

34. We further note that Section 628(c)(2)(C) specifically prohibits those actions that "prevent a multichannel video programming distributor from obtaining... programming." Thus, it appears that an analysis of anticompetitive harm, such as restricted or inhibited access to programming, is required to find violations of this provision. What evidence should the Commission consider when determining whether specific practices, understandings, arrangements, or activities restrict, inhibit or otherwise limit access to programming? We also ask whether this provision imposes any duty on a programmer to deal with non-affiliated programming distributors.

35. With respect to exclusive contracts, Section 628(c)(4) sets forth the criteria to be considered by the Commission when determining whether an exclusive contract is in the public interest, and thus not prohibited by Section 628 (c)(2)(D). These factors are the effect of such exclusive contract on (i) the development of competition in local and national multichannel video programming markets; (ii) competition from multichannel video programming distribution technologies other than cable; (iii) the attraction of capital investment in the production and distribution of new satellite cable programming; and (iv) diversity of programming in the multichannel video programming distribution market. In addition, the Commission is to consider the duration of the exclusive contract. We seek comment on objective standards or benchmarks that can be developed or considered to assess each of these criteria.[56] Moreover, are these the only factors that the Commission is permitted to consider? If not, what other factors are relevant to such a determination? Are there other benefits to exclusivity that should be considered?

36. We also ask commenters to identify, where possible, specific instances where we could establish in advance by rule that limited exclusive distribution agreements presumably are permitted under Section 628(c)(4). For example, we recognize that exclusive distribution rights are often given to encourage distributors to carry new program services. Such exclusive rights may well be essential to the introduction of new services and, thus, should be permitted to the extent necessary to ensure continued program diversity. Therefore, it may be in the public interest to define, at the outset, a rule that would permit exclusive distribution contracts for new program services. Such contracts could be deemed to meet the public interest test of Section 628(c)(4) if they were limited to a specific duration, *e.g.*, two years, that would facilitate the launch of the new service. We seek comment on this proposal and the appropriate limitations on such contracts. Commenters are also asked to provide other examples of contracts that could be presumed to serve the public interest.

37. Finally, we note that Section 628(c)(4)(D) refers to the effect of an exclusive contract on diversity in the "multichannel video programming distribution market." Given Section 628(c)(4)(B)'s reference to "local and national" markets, should we infer a similar local and national market focus to interpret Section 628(c)(4)(D), or should we employ some other type of market analysis?

C. Enforcement

38. Section 628(d) of the 1992 Cable Act provides that any multichannel video programming distributor aggrieved by conduct that it alleges to violate Section 628(b) or (c) may commence an adjudicatory proceeding at the Commission. Section 628(f) requires the Commission to prescribe regulations to implement this section, including provisions for expedited review by the Commission, procedures for data collection, and provision for penalties against any person filing a frivolous complaint.

39. We propose to adopt rules governing a formal complaint process that would resolve disputes without a hearing unless there are substantial and material issues of fact that cannot be resolved by the staff or through stipulation by the parties. We propose to develop a complaint process based on certain procedures used in complaint cases regarding the lowest unit charges filed under Section 315(b) of the Communications Act[57] and those used in processing common carrier complaints under Section 208 of the Communications Act.[58] In developing this process, we propose to limit the pleading cycle to encourage substantive discussions of the issues in dispute, and to expedite complaint

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[56] In addition, how will the Commission determine the exact terms of an unwritten "agreement," and thus be able to assess whether that agreement is in the public interest?

[57] *See Report and Order*, MM Docket No. 91-168, 7 FCC Rcd 678 (1991), *recon. denied*, 7 FCC Rcd 4611 (1992); *see also Order*, 7 FCC Rcd 6661 (1992), *app. for rev. aff'd. in part*, FCC 92-528, released November 30, 1992.

[58] *See* 47 C.F.R. §§ 1.720 - 1.734. We seek comment on the extent to which these rules provide a useful model for processing complaints filed under Section 628. We particularly seek comment on the discovery permitted by these rules. Section 628(f)(2) explicitly requires the Commission to establish procedures for "collect[ing] such data, including the right to obtain copies of all contracts and documents reflecting arrangements and understandings alleged to violate this section, as the Commission requires to carry out this section...." We believe that it is important to craft regulations that will minimize, as much as possible, the impact on Commission resources of enforcing Section 628's requirements. Thus, we believe that this provision authorizes the Commission to establish rules governing discovery by the parties to a complaint of the data necessary to resolve Section 628 disputes, so long as appropriate safeguards are imposed to protect proprietary information. *See* paragraph 47, *infra*. We seek comment on this interpretation of our authority.

resolution by eliminating unnecessary pleadings. For example, we propose to permit a complaint and response. Replies would not be permitted, and parties against whom a complaint is filed would not be permitted to file separate motions to dismiss or motions for summary judgment -- any such requests should be included in the answer. We seek comment on these proposals.

40. We propose to require that complaints set forth specific allegations of misconduct and include affidavits by knowledgeable persons, or other tangible evidence, to support each allegation made in the complaint. Failure to plead each claim with specificity or to include supporting factual evidence for each allegation will result in dismissal of that portion of the complaint. We propose to require defendants to respond in 20 days. Answers should provide substantive support of all factual allegations or denials. We seek comment on these proposals.

41. After the staff has reviewed the pleadings, it would determine whether the complainant has established a *prima facie* case. At this point, if a *prima facie* case has been made, we tentatively believe that the staff should hold a status conference to attempt to resolve any factual disputes and to determine whether early resolution is possible based on the staff's preliminary determinations. At the status conference, the staff should also discuss with the parties appropriate limitations on discovery. Given the statutory directive for expeditious resolution of Section 628 complaints, we propose to allow the parties to elect to utilize our Alternative Dispute Resolution ("ADR") process.[59] We seek comment on whether we would be required to implement specific procedures for ADR in this area and, if so, what those procedures should encompass. We also seek comment on ways to encourage parties to elect to resolve disputes through ADR. For example, should ADR for program access disputes include specific provisions for discovery, when appropriate, to provide an incentive for complainants to agree to ADR? We seek comment on these proposals.

42. We also seek comment on what standard the Commission should employ to determine whether a *prima facie* case has been made, and whether a single standard can be used for all complaints brought under Section 628, or whether different standards must be developed for different types of claims, *e.g.*, a price discrimination claim as opposed to another type of unfair practices claim. In addition, we question whether the information necessary to establish a *prima facie* case is readily available to potential complainants aggrieved by violations of regulations adopted to implement Section 628. If not, what minimum threshold showing can be made with available information that would be appropriately required to establish a *prima facie* case?

43. We also seek comment on what sorts of presumptions could be established for evaluating whether a complainant has made a *prima facie* case. Could objective criteria be developed? Could specific benchmarks be used as an evidentiary factor in complaint cases, such as specified program penetration levels that shift the burdens of proof for the complaint proceedings prescribed by Section 628? In this regard, we note that the stated purpose of Section 628 is to "promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies." Penetration benchmarks could possibly provide a useful tool for measuring the availability of programming and, thus, ascertaining whether the behavior complained of violates Section 628.[60] For example, if a specific MMDS operator files a complaint against a program service alleging unfair behavior that impedes its access to programming, it may be relevant to consider whether other MMDS operators are, in fact, distributing the same programming. If so, and the penetration level of the programming on MMDS systems meets the designated benchmark, would this be relevant evidence that the programmer is not engaging in behavior in violation of Section 628? Are there circumstances under which such evidence could reach a level to warrant a presumption that would require the complainant to meet a higher burden of proof to establish a *prima facie* case?[61] Or, are there too many other factors affecting such penetration levels to permit a fair inference of discrimination based on any such disparity?

44. Similarly, we ask whether there are any circumstances under which it would be appropriate to consider the relationship between the volume of programming sold by a vertically integrated program supplier to alternative delivery media, such as MMDS or TVROs, and the volume of programming sold by that program supplier to its affiliated cable systems. For example, what would be the relevance, if any, of a showing by a vertically integrated

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[59] *See Initial Policy Statement and Order*, CC Docket No. 91-919, 6 FCC Rcd 5669 (1991).

[60] Commenters should address the type of harm that must be shown to establish a benchmark. *See* discussion at paragraph 10, *supra*.

[61] Under such an approach, the Commission could, for instance, make an initial determination that if the penetration level of a particular satellite cable program service ("Program Service X") to MMDS operators is below a specified percentage, then a rebuttable presumption in favor of a complainant concerning its access to "Program Service X" would be built into the complaint process in determining whether a *prima facie* case has been presented. Alternatively, if the penetration level of "Program Service X" to MMDS operators reaches that specified percentage, the burden of proof for the complainant could be increased, or the complainant could be prevented from arguing that the service provider engages in systematic discrimination, or the service provider could enjoy a rebuttable presumption in its favor. What effect, if any, would the use of penetration benchmarks as evidence, or to provide a rebuttable presumption for either party in the complaint process, have on the competitive marketplace for satellite cable programming? Would any such use of penetration benchmarks afford undue protection to program suppliers that do, in fact, engage in unjustified discrimination against a particular operator? If distribution penetration benchmarks are used, should they be established at a national, regional or local level, and should there be different levels established for different services (i.e. DBS vs. MMDS vs. satellite dish)? If so, what should these levels be? We seek comment on whether the total national, regional or local penetration of a particular service itself should be considered when establishing an appropriate program access benchmark (or, program distribution penetration level) for that service. Finally, we seek comment on the evidence needed to rebut either presumption based upon such a benchmark for program penetration.

programming supplier that it sold the majority of its programming, or some substantial volume of sales, to such alternative delivery media, but sold a comparatively small volume of programming to its affiliated cable systems, in a complaint case alleging that the programmer is engaging in anticompetitive behavior? What sales volumes or comparative relationship between the sales volumes could be relevant? Again, we ask whether there are too many other factors affecting such sales volumes to permit a fair inference of discrimination based on any such disparity. We seek comment on, and encourage commenters to propose, other benchmarks or objective criteria relevant to determining whether a *prima facie* case has been made.

45. After the status conference with the Commission staff, if the parties elected to continue to pursue a formal proceeding, and if discovery were required, we propose that the staff would issue a discovery order setting forth procedures for, and limitations on, discovery.[62] We seek comment on the forms of discovery that should be permitted as of right, and what forms of discovery should be permitted only on a showing of special need. For example, should a complainant routinely be entitled to a specified number of interrogatories and document production requests as a matter of right, with depositions permitted only upon a special showing, or should the staff determine the parameters of discovery on a case-by-case basis?

46. We seek comment on what, if any, self-executing discovery could be adopted. For example, could particular documents be identified in this proceeding, in addition to those set forth in Section 628(f)(2), that would be clearly relevant to resolving the various kinds of complaints that could arise under Section 628? We seek comment on practical, expeditious ways for the staff to resolve discovery disputes. In addition, we seek comment on what period of time, such as 60 days, would be appropriate within which to require completion of discovery.

47. We also propose that the staff discovery order include a protective order with respect to document production that limits examination of the documents produced to parties designated in the order (and the Commission), and prohibits further dissemination of the information revealed therein.[63] We further propose to permit defendants to redact proprietary information not relevant to the resolution of the complaint, such as the specific identity of a customer (but not the *type* of multichannel video programming distributor involved), so long as the defendant provided a general description of the nature of the redacted information. We invite other suggestions, as well, for protecting proprietary information without undermining legitimate discovery. We propose to adopt a specific rule that requires the parties to abide by the terms of the staff protective order.

48. Within 30 days after completion of discovery, the complainant would be required to file an amended complaint based on the information discovered. The defendant would have 15 days to respond. The parties would again be given the opportunity to elect ADR. If ADR is not selected, the staff would impose an appropriate sanction where it finds that our rules have been violated, or it would dismiss the complaint. In appropriate circumstances, the dispute may be referred to an administrative law judge ("ALJ") for resolution. Any final decision rendered by the staff or an ALJ may be appealed directly to the full Commission. *See* 47 C.F.R. § 1.115.

49. Section 628(e)(1) provides that the Commission has the power to order appropriate remedies, including, if necessary, the power to establish prices, terms and conditions of sale of programming to an aggrieved multichannel video programming distributor. We seek comment on what additional remedies would be deemed "appropriate" for Section 628 violations. In addition, Section 628(e)(2) specifically states that any such remedies are in addition to and not in lieu of the Commission's authority to impose forfeitures pursuant to title V of the Communications Act for violations of its regulations. We seek comment on the appropriate application of our forfeiture guidelines to Section 628 violations.[64]

D. Other Programming Distribution Issues

50. *Limitations of Section 628.* Section 628(c)(3)(A) of the 1992 Cable Act specifies that the program distribution rules do not require a national or regional distributor of video programming to make that programming available outside of the geographic area in which it is authorized or licensed to distribute such programming. We seek comment on implementation of this provision. What parameters should be established for determining whether a change in the geographic area in which an operator is authorized or licensed has occurred? In addition, Section 628(c)(3)(B)(i) provides that these carriage rules do not apply to the signal of a television network affiliate or other television signal that is retransmitted by satellite but that does not constitute "satellite broadcast programming" because it is retransmitted by the broadcaster or someone authorized by the broadcaster.[65] Similarly, Section 628(c)(3)(B)(ii) provides that these carriage rules do not apply to internal satellite communications of broadcast or cable networks that would not be considered "satellite broadcast programming." We seek comment on the appropriate interpretation of these provisions.

51. *Data collection.* Section 628(f)(2) directs the Commission to prescribe regulations to establish procedures for collecting necessary data, including the right to obtain copies of all contracts and documents reflecting arrange-

[62] In developing this complaint process, we seek to limit the administrative burden on Commission staff to the greatest possible extent. For this reason, we believe that discovery procedures should minimize Commission involvement in the analysis of voluminous evidentiary materials but provide access by the parties to the information necessary to resolve a complaint.

[63] Failure to abide by the terms of any protective order issued by the Commission or its staff may result in the imposition of sanctions which could include those set forth in 47 C.F.R. § 1.24 (censure, suspension or disbarment of persons practicing before the Commission), as well as possible dismissal of the complaint.

[64] *See Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992).

[65] Section 628(i)(3) of the 1992 Act defines "satellite broadcast programming" as "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.

ments and understandings that allegedly violate the provisions of Section 628. We believe that necessary data will include contracts or other documents that offer information on past practices, prices and conditions for program sales, levels of programming penetration, as well as evidence to justify permissible causes for price differentials. Accordingly, we seek comment on the type of data that may become necessary during the course of a Section 628 proceeding, and how we may obtain such information. Also, what if any additional procedures must be developed to protect proprietary information?

52. *Annual Report to Congress.* Section 628(g) directs the Commission, beginning no later than 18 months after promulgating the regulations, to provide an annual report to Congress on the state of competition for the delivery of video programming. It is our tentative view that the annual report should at least consist of an analysis of Section 628 complaints filed at the "Commission and generally available industry information relating to the status of competition in the satellite cable and broadcast programming marketplace. We seek comment on this approach and the nature of any additional information that we could obtain to contribute to our report. In this regard, we emphasize that detailed information on pricing and sales of programming would enhance our ability to monitor changes in the programming marketplace. For example, we could survey the industry or require that parties submit information about (1) the number of independently owned cable operators and programming distributors; (2) the degree of vertical integration between cable operators and programming distributors; (3) the penetration or availability of programming to competing multichannel services; and (4) the levels of pricing differentials for programming, including the range and average of volume-related discounts and other permissible factors for differentials. In acquiring data on programming access, we ask commenters to consider the extent to which any of the information in our report to Congress might be similar to information collected for other proceedings related to the 1992 Act so that we could avoid duplicating such information. Moreover, we seek comment on the appropriate level of detailed information that is necessary to serve the Commission's interest without overburdening our own resources, as well as cable operators, programmers, and competing multichannel program distributors.

53. *Frivolous Complaints.* Section 628(f)(3) requires the Commission to provide for penalties to be assessed against any person filing a frivolous complaint regarding programming practices. We seek comment on implementation of this provision. We propose to assess monetary forfeitures for frivolous complaints, and we seek comment on the relationship between the penalties that Congress has indicated that we may assess under the Section 628 as well as the more general monetary forefeiture provisions of Section 503 of the Communications Act. Also, what factors should determine whether a complaint is frivolous? What guidelines should determine forfeiture amounts? Should the forfeiture amount be based on the resources expended by the Commission in considering the claim as well as by the party in defending against the claim?

IV. PROGRAM CARRIAGE AGREEMENT ISSUES

54. The provisions of the 1992 Cable Act discussed above primarily restrict the activities of programming vendors with respect to cable operators and other multichannel programming distributors. Section 12 of the 1992 Cable Act restricts the activities of cable operators and other multichannel programming distributors with respect to programming vendors. Section 12 amends the Communications Act by adding new Section 616, which addresses regulation of carriage agreements between multichannel video programming distributors and video program vendors.[66]

55. Section 616(a) directs the Commission to establish regulations that prevent multichannel programming distributors from entering into carriage agreements that condition carriage of a vendor's programming on particular concessions. Specifically, the Commission must adopt regulations that prevent a multichannel distributor from requiring a programming vendor to provide it with a financial interest in the programming service as a condition of carrying the program service on its system. Section 616(a) prohibits a multichannel distributor from coercing a programming vendor to provide it with exclusive rights as a condition of carriage, from retaliating against such a vendor for failing to provide exclusive rights, or from otherwise engaging in conduct that discriminates on the basis of affiliation of vendors in the selection, terms or conditions for carriage of video programming. In addition, the statute specifies procedures the Commission must adopt for implementation of the above provisions, including expedited review of complaints made by a programming vendor and assessment of appropriate penalties for violation of the carriage agreement rules as well as for the filing of frivolous claims.

56. We seek comment on how best to implement these provisions. First, Section 616(a)(1) of the 1992 Cable Act provides that the Commission must adopt rules to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on the operator's systems. Because the statute does not prohibit multichannel distributors from holding a financial interest in a programming service, we anticipate that it will not always be clear whether an operator has "required" the programming vendor to provide it with a financial interest as a condition of carrying a particular programming service. What factors should determine whether such is the case? Second, Section 616(a)(2) directs the Commission to adopt rules that prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage. What types of activities would constitute indicia of coercion? Also, we ask how the Commission can clearly distinguish between "coercion" and "negotiation", and whether we could conceivably construe certain mutually acceptable arrangements that would otherwise comply with Section 628 as "coercion." Further, the above provision makes clear that exclusive arrangements may exist

[66] Section 12 of the 1992 Act adds new Section 616(b), which defines "video programming vendor" as "a person engaged in the production, creation, or wholesale distribution of video programming for sale."

other than as a condition of carriage. Section 616 thus does not prohibit exclusive arrangements, but we believe that Section 616 must be read together with Section 628(c), which limits certain exclusive arrangements and establishes standards for determining whether exclusive contracts are in the public interest. We seek comment on this interpretation.

57. Third, Section 616(a)(3) provides that the new rules must prevent a multichannel video programming distributor from engaging in conduct that unreasonably restrains the ability of an unaffiliated video programming vendor to compete fairly, by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms or conditions for carriage of video programming. What specific conduct should be considered a violation of this section? We propose that an "unaffiliated video programming vendor" is a video programming vendor or service in which the multichannel distributor does not have an attributable interest, which could be defined by the broadcast attribution criteria of Section 73.3555 of the Commission's Rules.[67] In addition, we observe that Section 616(a)(3) prohibits multichannel video programming distributors from "discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors." We believe that a practice of discriminating in the context of carriage agreements involves different activities than those discussed with respect to Section 628 regarding programming access, so we seek comment on how we should define "discrimination" in the context of Section 616.[68] Additionally, we believe Section 628(h) is clear with respect to exclusive distribution arrangements, *i.e.*, such agreements entered into on or before June 1, 1990 are grandfathered in areas served by cable, but nullified if the area is not served by cable. With respect to matters other than exclusive programming arrangements, we propose to afford distributors and vendors six months from the date of adoption of these carriage agreement rules to bring their agreements into compliance. We seek comment on these proposals and on any other issues regarding implementation of this provision that commenters may deem relevant.

58. We also seek comment on the procedures to be established for review of complaints, and on the appropriate penalties and remedies to be ordered. Section 616(a)(4) provides for expedited review of any complaints made by a video programming vendor pursuant to this section. Should we follow the same review process as was discussed above with respect to Section 628(d), or should different complaint procedures be adopted? Should carriage agreements be afforded confidential treatment in full, or rather, should we only permit confidential or proprietary information to be redacted? Section 616(a)(5) provides that the Commission must adopt appropriate penalties and remedies for violations of this subsection, including requiring the multichannel video programming distributor to carry the unaffiliated program vendor.[69] What procedures should be established for mandatory carriage? We do not intend to require the multichannel distributor to carry the aggrieved programming service indefinitely. How long should mandatory carriage last? We also intend to assess forfeitures against violators. What guidelines should determine forfeiture amounts? Should the Commission also consider ordering remedies other than forfeiture or mandatory carriage, such as establishment of prices, terms and conditions of sale, similar to the remedies specified in Section 628(e)(1), as discussed above? In addition, Section 616(a)(6) provides that the Commission must delineate penalties to be assessed against any person filing a frivolous complaint pursuant to this section. We propose to assess monetary forfeitures for frivolous complaints and we ask for comment on the factors that should determine whether a complaint is frivolous. Likewise, what guidelines should determine forfeiture amounts? Should we base the forfeiture amount on the resources expended by the Commission in considering the claim and by the party defending against the claim?

V. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

59. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice of Proposed Rule Making*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Notice of Proposed Rule Making*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

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[67] For a more detailed discussion of attribution of ownership with respect to the programming access provisions of the 1992 Cable Act, *see* paragraph 9, *supra*. We invite comment on the attribution issues and alternatives raised in that discussion as they might apply in this context of carriage agreements. In this regard, we seek comment on whether the broadcast attribution rules will adequately detect *de facto* transfers of control for cable operators and programming services.

[68] We note that with respect to these carriage agreement rules, the House Report indicates that "the term 'discrimination' is to be distinguished from how that term is used in connection with actions by common carriers subject to title II of the Communications Act." The House Report further provides that the Commission is to define discrimination with respect to the extensive body of law addressing discrimination in normal business practices. House Report at 110. We seek comment on the appropriate interpretation of this language, particularly with respect to developing standards for identifying "discrimination" governed by Sections 616 and 628.

[69] We note that the House Report states that "[t]his legislation provides new FCC remedies and does not amend, and is not intended to amend, existing antitrust laws. All antitrust and other remedies that can be pursued under current law by video programming vendors are unaffected by this section." House Report at 111.

B. Ex Parte

60. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. Sections 1.1202, 1.203, and 1.206(a).

C. Comment Dates

61. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **January 25, 1993,** and reply comments on or before **February 16, 1993.** To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

D. Ordering Clauses

62. Authority for this proposed Rule Making is contained in Sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended.

63. For further information on this proceeding, contact James Coltharp, Mass Media Bureau, (202) 632-6302; Diane Hofbauer, Office of the General Counsel, (202) 632-6990; or Jane Halprin, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

SECTIONS 12 AND 19 OF THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992

SEC. 12. REGULATION OF CARRIAGE AGREEMENTS.

Part II of title VI of the Communications Act of 1934 is amended by inserting after section 615 (as added by section 5 of this Act) the following new section:

"SEC. 616. REGULATION OF CARRIAGE AGREEMENTS.

"(a) Regulations.--Within one year after the date of enactment of this section, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors. Such regulations shall--

"(1) include provisions designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;

"(2) include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system;

"(3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors;

"(4) provide for expedited review of any complaints made by a video programming vendor pursuant to this section;

"(5) provide for appropriate penalties and remedies for violations of this subsection, including carriage; and

"(6) provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

"(b) Definition.--As used in this section, the term 'video programming vendor' means a person engaged in the production, creation, or wholesale distribution of video programming for sale."

SEC. 19. DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO PROGRAMMING DISTRIBUTION.

Part III of title VI of the Communications Act of 1934 is amended by inserting after section 627 (47 U.S.C. 547) the following new section:

"SEC. 628. DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO PROGRAMMING DISTRIBUTION.

"(a) Purpose.--The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.

"(b) Prohibition.--It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to

prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

"(c) Regulations Required.--

"(1) Proceeding required.--Within 180 days after the date of enactment of this section, the Commission shall, in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies, prescribe regulations to specify particular conduct that is prohibited by subsection (b).

"(2) Minimum contents of regulations.--The regulations to be promulgated under this section shall--

"(A) establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor;

"(B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups; except that such a satellite cable programming vendor in which a cable operator has an attributable interest or such a satellite broadcast programming vendor shall not be prohibited from--

"(i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;

"(ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming;

"(iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or

"(iv) entering into an exclusive contract that is permitted under subparagraph (D);

"(C) prohibit practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section; and

"(D) with respect to distribution to persons in areas served by a cable operator, prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines (in accordance with paragraph (4)) that such contract is in the public interest.

"(3) Limitations.--

"(A) Geographic limitations.--Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution.

"(B) Applicability to satellite retransmissions.--Nothing in this section shall apply (i) to the signal of any broadcast affiliate of a national television network or other television signal that is retransmitted by satellite but that is not satellite broadcast programming, or (ii) to any internal satellite communication of any broadcast network or cable network that is not satellite broadcast programming.

"(4) Public interest determinations on exclusive contracts.--In determining whether an exclusive contract is in the public interest for purposes of paragraph (2)(D), the Commission shall consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:

"(A) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;

"(B) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;

"(C) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;

"(D) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and

"(E) the duration of the exclusive contract.

"(5) Sunset provision.--The prohibition required by paragraph (2)(D) shall cease to be effective 10 years after the date of enactment of this section, unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

"(d) Adjudicatory Proceeding.--Any multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation of subsection (b), or the regulations of the Commission under subsection (c), may commence an adjudicatory proceeding at the Commission.

"(e) Remedies for Violations.--

"(1) Remedies authorized.--Upon completion of such adjudicatory proceeding, the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor.

"(2) Additional remedies.--The remedies provided in paragraph (1) are in addition to and not in lieu of the remedies available under title V or any other provision of this Act.

"(f) Procedures.--The Commission shall prescribe regulations to implement this section. The Commission's regulations shall--

"(1) provide for an expedited review of any complaints made pursuant to this section;

"(2) establish procedures for the Commission to collect such data, including the right to obtain copies of all contracts and documents reflecting arrangements and understandings alleged to violate this section, as the Commission requires to carry out this section; and

"(3) provide for penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

"(g) Reports.--The Commission shall, beginning not later than 18 months after promulgation of the regulations required by subsection (c), annually report to Congress on the status of competition in the market for the delivery of video programming.

"(h) Exemptions for Prior Contracts.--

"(1) In general.--Nothing in this section shall affect any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into on or before June 1, 1990, except that the provisions of subsection (c)(2)(C) shall apply for distribution to persons in areas not served by a cable operator.

"(2) Limitation on renewals.--A contract that was entered into on or before June 1, 1990, but that is renewed or extended after the date of enactment of this section shall not be exempt under paragraph (1).

"(i) Definitions.--As used in this section:

"(1) The term 'satellite cable programming' has the meaning provided under section 705 of this Act, except that such term does not include satellite broadcast programming.

"(2) The term 'satellite cable programming vendor' means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor.

"(3) The term 'satellite broadcast programming' means broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.

"(4) The term 'satellite broadcast programming vendor' means a fixed service satellite carrier that provides service pursuant to section 119 of title 17, United States Code, with respect to satellite broadcast programming."

APPENDIX B

Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. *Reason for action.* This action is taken to implement certain provisions of the Cable Television Consumer Protection and Competition Act of 1992.

II. *Objectives.* The Cable Act of 1992 and the subsequent Commission actions to implement it are intended to set forth a regulatory scheme for cable systems in the area of programming distribution and carriage agreements. Congress adopted the statute to address its concerns regarding the performance of the cable industry in these areas since the 1984 Cable Act was enacted. The program access provisions of this act are intended to (i) promote the public interest by increasing competition and diversity in the multichannel video programming market, (ii) increase the availability of satellite cable and broadcast programming, and (iii) encourage the development of communications technologies. The carriage agreements provision restricts the activities of cable operators and other multichannel programming distributors with respect to programming vendors.

III. *Legal basis.* Action as proposed for this rule making is contained in Sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended, and the Cable Television Consumer Protection and Competition Act of 1992.

IV. *Reporting, recordkeeping and other compliance requirements.* In order to implement the 1992 Cable Act, we might require that multichannel video distributors and cable operators submit data regarding the prices, conditions, and level of program sales.

V. *Federal rules which overlap, duplicate or conflict with this rule.* Sherman Act, Clayton Act, and Robinson-Patman Act.

VI. *Description, potential impact and number of small entities affected.* In order to implement the Cable Television Consumer Protection and Competition Act of 1992, the Commission has proposed to add new rules and modify others. Depending on the extent of such actions, different cable systems may be affected in different ways. For example, certain cable operators or programming distributors may find it necessary to alter pricing or contracting practices as related to programming distribution, while other cable operators or other multichannel video distributors may enjoy increased access to programming.

VII. *Any significant alternatives minimizing impact on small entities and consistent with stated objective.* None.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-264

In the Matter of

Implementation of Sections 11
and 13 of the Cable Television
Consumer Protection and Competition
Act of 1992

Horizontal and Vertical Ownership
Limits, Cross-Ownership Limitations
and Anti-trafficking Provisions

NOTICE OF PROPOSED RULE MAKING AND NOTICE OF INQUIRY

Adopted: December 10, 1992; Released: December 28, 1992

Comment Date: February 9, 1993
Reply Comment Date: March 3, 1993

By the Commission:

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I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992.[1] By this *Notice of Proposed Rule Making and Notice of Inquiry* ("*Notice*") we seek comment on the interpretation and implementation of the cross-ownership and anti-trafficking provisions of the 1992 Cable Act. We also seek comment on the adoption of limits on horizontal concentration and vertical integration in the cable industry.

II. BACKGROUND

2. Section 13 of the 1992 Cable Act adds a new Section 617 to the Communications Act of 1934, as amended,[2] which establishes a three year holding requirement for cable systems. This cable anti-trafficking rule, with certain exceptions, prohibits the sale or transfer of ownership in a cable system within three years following the acquisition or initial construction of such system. Section 11 of the Cable Act of 1992 establishes several restrictions on the ownership and sale of cable systems. First it modifies Section 613(a) of the Communications Act of 1934, as amended, to prohibit the common ownership of a cable system and a multichannel multipoint distribution service ("MMDS") or a cable system and a satellite master antenna television service ("SMATV"), apart from the franchised cable service, within a franchise area. Section II of the new Act also amends Section 613 of the Communications Act of 1934 by adding a new subsection (f)(1), which requires the Commission to conduct a proceeding: (1) to prescribe reasonable limits on the number of cable subscribers "a person can reach through cable systems owned by such person ("subscriber limits"); (2) to prescribe reasonable limits on the number of cable channels that can be occupied by a video programmer in which a cable operator has an ownership interest ("channel occupancy limits"); and (3) to consider the necessity and appropriateness of imposing limitations on the degree to which "multichannel video programming distributors" may participate in the creation or production of video programming.

3. The MMDS and SMATV cross-ownership restrictions and the anti-trafficking rule contain no specific effective date and thus, pursuant to Section 28 of the 1992 Cable Act, became effective on December 4, 1992 (the effective date of the 1992 Cable Act). However, the provision of the anti-trafficking rule which limits the amount of time that a franchise authority has to disapprove a request to transfer a cable system, will not become effective until the Commission adopts regulations regarding the information required in connection with such requests.[3] The Cable Act of 1992 also requires the Commission to conduct a proceeding to establish subscriber and channel occupancy limits, and to consider the need for establishing limits on the participation of multichannel video program distributors in the creation and production of video programming, within one year from the date of enactment of the 1992 Cable Act (*i.e.*, by October 5, 1993).

4. Neither the 1992 Cable Act nor its legislative history[4] makes plain Congress' rationale in enacting the anti-trafficking rule. The House Report suggests only that Congress intended this provision to restrict profiteering transactions, which are likely to adversely affect cable rates or service in

[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("Cable Act of 1992" or "1992 Cable Act").

[2] The Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq. ("Communications Act of 1934").

[3] 47 U.S.C. § 537 (e).

[4] *See* House Committee on Energy and Commerce, H.R. Rep. No. 102-628 ("House Report"), 102d Cong., 2d Sess. (1992);

the franchise area.[5] In this proceeding, we seek to identify the proper interpretation of the anti-trafficking rule and to establish an appropriate system of implementation.

5. The 1992 Cable Act and its legislative history demonstrate Congress' concern regarding horizontal concentration and vertical integration in the cable television industry. The vertical and horizontal limits required by Section 11 of the 1992 Cable Act are intended to address these concerns. In particular, Congress sought to prevent large, vertically integrated cable systems from creating barriers to entry for new programmers and from causing a reduction in the number of media voices available to consumers. In addition, the 1992 Cable Act was intended to curb the ability and the incentive of cable operators to favor their affiliated programmers over other programming services. Congress also sought to restrict the degree to which vertically integrated program suppliers favor their affiliated cable operators over unaffiliated cable operators and other program distributors.[6]

6. In drafting the 1992 Cable Act, however, Congress also recognized that certain benefits derive from vertical integration and horizontal concentration. For example, the House Report acknowledges that vertical relationships promote diversity and make the creation of new, innovative and risky programming services possible.[7] Further, the House Report suggests that vertical relationships may be an efficient way of financing new services and compensating cable operators for assuming some of the risk associated with the launch of new cable programming services.[8] With respect to horizontal concentration, the House Report recognizes that consolidation in the cable industry has benefited consumers by allowing efficiencies in administration, distribution, and programming procurement. Further, the House Committee concluded that large multiple system operators ("MSOs") are able to take risks that small operators would not, and that such MSOs provide a sufficient subscriber base to encourage new program entry.[9] In establishing the subscriber limits and channel occupancy restrictions required by the 1992 Cable Act, the Commission must balance the concerns expressed by Congress with the efficiencies and benefits gained by such increased concentration and integration.

III. SALES OF CABLE SYSTEMS

7. Section 13 of the 1992 Act establishes a three-year holding period for cable systems. This restriction is largely self-executing and, thus, became effective on December 4, 1992.[10] Under the cable anti-trafficking rule, with certain exceptions, "no cable operator may sell or otherwise transfer ownership in a cable system within a 36-month period following either the acquisition or initial construction of such system by such operator."[11] For purposes of this provision, multiple system transfers which provide for the subsequent transfer of one or more such systems shall be considered part of the initial transaction. Since we intend to codify the anti-trafficking restriction into our rules, we seek comment on its interpretation and implementation.

8. *Jurisdiction and Enforcement.* The 1992 Cable Act does not address enforcement of the anti-trafficking rule. The 1992 Cable Act does, however, authorize the Commission to grant waivers of the rule, but only after approval by the local franchise authority, if such approval is required. We believe that the local franchise authority should have primary responsibility to monitor and enforce the anti-trafficking rule. Since local franchising authorities are responsible for awarding cable franchises and for approving sales and transfers of such franchises, we tentatively conclude that local franchise authorities can most efficiently monitor and enforce compliance with the anti-trafficking restriction. We propose to require cable operators seeking to transfer ownership in a cable system to certify to the franchise authority that the proposed transfer satisfies the three-year holding requirement or is exempt under one of the exceptions contained in the rule. If the terms of the franchise agreement do not require approval of the franchise authority for transfer or assignment of a cable system, the cable operator should nonetheless certify to the franchising authority that such transfer is not in violation of the three year holding requirement. Operators making such a certification will be presumed to be in compliance with the anti-trafficking rule unless the local franchise authority finds to the contrary. Alternatively, a cable operator may seek a waiver of the anti-trafficking rule from the Commission in appropriate circumstances. Commenters are asked to address whether these procedures are suitable for enforcing the anti-trafficking rule. We also invite comment regarding how these procedures could best be crafted.

9. *Transfer of Ownership.* The term "Cable Operator" is defined in Section 602(5) of the Communications Act of 1934.[12] However, neither the Communications Act of 1934 or the 1992 Cable Act specify what shall constitute a "transfer of ownership in a cable system" subject to the anti-trafficking rule. We seek comment on the appropriate interpretation of "transfer of ownership in a cable system" for purposes of applying the three year holding period. The House Report indicates only that this provision was intended to prevent profiteering transactions and other transfers that could affect cable television rates or service.[13] The Act, itself, also indicates that Congress intended to exempt

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Senate Committee on Commerce, Science and Transportation, S., Rep. No. 102-92 ("Senate Report"), 102d Cong., 1st Sess. (1991); House Committee on Energy and Commerce, H.R. Conf. Rep. No. 102-862 ("Conference Report"), 102d Cong., 2d Sess. (1992).

[5] The House Report also indicates that the anti-trafficking rule was not meant to prevent lenders from obtaining a security interest in connection with providing financing for cable system acquisitions. House Report at 42.

[6] Cable Act of 1992, Sec. 2.

[7] House Report at 41.

[8] *Id.*

[9] *Id.* at 43.

[10] Unlike the remainder of Section 13, the 120-day limitation on franchise authority consideration of transfer requests does not become effective until the Commission adopts regulations regarding the information that a cable operator must provide to the franchise authority in connection with such requests. Conference Report at 83.

[11] 47 U.S.C. 537 (a).

[12] "Cable Operator" is defined as "any person or group of persons who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." 47 U.S.C. § 522 (5).

[13] House Report at 119.

inter-company transfers of ownership. We ask commenters to identify the types of transactions Congress sought to include within the anti-trafficking rule.

10. In commenting on this matter, parties are asked to consider existing Commission rules restricting the transfer of broadcast licenses and construction permits. Specifically, we note the Commission's one-year holding requirement applicable to broadcast licenses obtained through the comparative hearing process or pursuant to our Minority Ownership Policy.[14] This one-year holding requirement is applicable only to applications for assignment or transfer of control of such licenses or construction permits pursuant to Section 310(d) of the Communications Act of 1934.[15] Thus, transfers of ownership interests which do not result in a transfer of control or assignment of license are not subject to this restriction. Similarly, the Commission's previous broadcast anti-trafficking rule was applicable only upon assignment or transfer of control of the broadcast license.[16] Commenting parties are asked to address whether "transfer of ownership in a cable system" should be defined by reference to the broadcast transfer of control standards implemented pursuant to Section 310(d) of the Communications Act of 1934.[17]

11. In this regard we note that, for purposes of Section 310(d) of the Communications Act of 1934, "transfer of control" is not limited to transfer of legal control in a formal sense, but may also consist of transfer of actual control by virtue of the particular facts presented.[18] Thus, transfers of control are not limited to transfers of majority stock ownership, but may include any transfer of actual working control in whatever manner exercised (*i.e.* transfers of minority stock interests or changes in the ability to appoint the board of directors).[19] Accordingly, determinations regarding what constitutes a transfer of control in the broadcast area are made by the Commission on a case-by-case basis.

12. We tentatively conclude that our broadcast transfer of control standards are appropriate to implement the cable anti-trafficking rule. We ask commenters to indicate whether those standards will provide cable operators and franchise authorities with sufficient guidance regarding application of the anti-trafficking restriction, and encompass the types of transfers that Congress intended to restrict. Alternatively, it may be preferable to establish a fixed transfer of ownership threshold for purposes of applying the anti-trafficking rule. For example, the anti-trafficking rule could be interpreted to apply only to changes in who controls 50% or more of the outstanding equity in a cable system. We ask commenters to indicate whether this definition would be consistent with the objectives of the anti-trafficking rule or whether a standard based on transfer of some lesser percentage of ownership (*e.g.* 25%, 30%, 40%) would be more appropriate. Finally, the attribution criteria contained in Section 73.3555 (Notes) of our Rules could also be used to define ownership interests subject to the anti-trafficking rule.[20] However, it does not appear that Congress intended the anti-trafficking rule to restrict transfers of such noncontrolling ownership interests. Such transfers are unlikely to be engaged in for purposes of profiteering or to affect cable rates or service. We invite comment regarding which of these standards would be most appropriate in implementing the cable anti-trafficking provision in accordance with Congressional intent.

13. We also invite comment regarding what, if any, procedures the Commission should establish for resolution of complaints arising from determinations under this provision. Commenters should indicate whether the Commission or the federal or state courts should resolve complaints involving the application of the anti-trafficking rule to a particular transaction. Preliminarily, we believe that such complaints should be resolved at the local level, either according to relevant procedures contained in the franchise agreement or by commencement of an action in the state or federal courts. Alternatively, we ask commenters to indicate whether the Commission should establish specific procedures to be followed in resolving disputes regarding application of the anti-trafficking rule to ensure consistency in the interpretation of the rule and to allow for participation by all interested parties. If such procedures are appropriate, commenters should indicate whether the provisions of Section 76.7 of the Commission's rules (the special relief rules), or some modified form of these procedures, would be acceptable. The Cable Act of 1992 is also silent regarding what, if any, sanctions should be applicable to willful violations of the anti-trafficking rule. Commenters should address what sanctions would be appropriate for transfers in violation of the anti-trafficking rule. We note that although some sanctions such as forfeiture may be applicable (via Section 503 of the Communications Act), we do not interpret the anti-trafficking provision as necessarily requiring reversal of transfers of ownership based on good faith interpretation of the rule, where such transfers are subsequently found to violate the rule.

14. The 1992 Cable Act does not indicate how the three-year holding period should be calculated. Initial construction might commence, for example, on the date of activation of a constructed system or upon award of a cable

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[14] *See* 47 C.F.R. § 73.3597 (a).

[15] Section 310(d) of the Communications Act of 1934, as amended, requires Commission approval prior to the transfer or assignment of a construction permit or station licenses or transfer of control of any corporation holding such permit or license. 47 U.S.C. § 310 (d).

[16] *See Report and Order* in Docket No. 13864, 32 FCC 689 (1962). The three-year holding period was eliminated by the Commission in 1982 and the underlying anti-trafficking policy was revised. *Report and Order* in MM Docket No. 84-19, 101 FCC 2d 402 (1984).

[17] 47 U.S.C. § 310(d).

[18] *See Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965), *cert den.*, 383 U.S. 967 (1966).

[19] *See* 47 C.F.R. § 73.3555 (Note 1); 47 C.F.R. § 76.501 (Note 1).

[20] The attribution criteria generally define what interests held in or relationships to media entities will be considered "cognizable" for purposes of applying the multiple ownership rules. They constitute the means by which the broadcast multiple ownership rules are implemented. Under existing standards, all non-voting stock interests are generally not attributable. Voting stock interest of 5% or more are generally considered attributable. Passive investors may hold up to 10% of a company's voting stock without incurring attribution. The Commission is currently considering raising the attribution threshold from 5% to 10% and from 10% to 20% for passive investors, and expanding the class of passive investors. *See Notice of Proposed Rule Making and Notice of Inquiry* in MM Docket No 92-51, 7 FCC Rcd 2654 (1992) ("Capital Formation Proceeding").

franchise. Similarly the date of an acquisition or transfer might be the effective date of the transfer or assignment agreement or it may be the date an application for transfer or assignment is filed with the local franchise authority. Commenters are requested to specify what dates should be used when calculating the period between initial construction and transfer or assignment of a cable system. Commenters should also specify what dates should apply when calculating the period between initial acquisition of a cable system and transfer or assignment of such system.[21] In this regard, it may be relevant to note that the one-year holding period applicable to broadcast licenses commences on the date of initiation of program tests and terminates on the date the application for transfer or assignment of license is filed with the Commission.[22] We seek comment regarding the appropriate treatment of MSO transfers under this provision. It does not appear that the anti-trafficking restriction was meant to forestall MSO transfers; however, it is unclear whether the three-year holding period must be satisfied for each system owned by an MSO. Commenters should indicate whether the Commission should establish separate procedures for determining compliance with the anti-trafficking provision for transfers or assignments of MSOs.

15. *Exceptions.* The Cable Act of 1992 establishes three exceptions to the anti-trafficking restriction. We seek to clarify implementation of these exceptions, and ask commenters to indicate what types of transactions are contemplated by each exception. The first exception excludes any transfer or assignment of a cable system which is not subject to Federal income tax liability. This exception seems to address transactions involving tax certificates issued by the Commission pursuant to Section 1071 of the Internal Revenue Code ("Code"), which allow deferral of gains taxes for businesses acquired by minorities.[23] This exception may also be applicable to so-called "tax free" exchanges of assets under Section 1031 of the Code and to "tax free" reorganizations under Section 368 of the Code. Although these transactions are referred to as tax free, they essentially allow deferral of income recognition. We tentatively consider all of these transactions to be eligible for this exception. These transactions are not subject to current tax liability and are consistent with the objectives of the anti-trafficking provision. We seek comment, however, regarding whether the payment of cash or other taxable consideration, to equalize the value of assets in like system exchanges, should render such a transaction ineligible for this exception. Commenters are requested to address these tentative conclusions and to identify any other transactions that may qualify for this exception.

16. The second exception excludes any sale required by operation of any law, or by any act of any Federal agency, any state or political subdivision thereof, or any franchising authority. We believe that this exception was intended primarily to enable franchise authorities or other government entities to require the transfer of a cable system that is in violation of its franchise agreement or that is otherwise providing inadequate service. This exception may also be interpreted to include transfers of cable systems in the context of bankruptcy proceedings or other types of receivership. We seek comment on these interpretations and on any other types of transactions that may be contemplated by this exception. We also note that Section 7 of the 1992 Cable Act permits local and municipal authorities to operate cable systems in their franchise area without obtaining a franchise. We ask commenters to indicate whether sales of municipally operated cable systems were also intended to be exempt from the anti-trafficking rule pursuant to this exception.

17. Third, the 1992 Cable Act exempts any sale, assignment or transfer to one or more purchasers, assignees or transferees controlled by, controlling, or under common control with the seller, assignor or transferor. We believe that this exception was intended to apply to *pro forma* transfers as defined in Section 73.3540(f) of our Rules. The House Report indicates that a broad definition of control was intended to apply to this exception. The House Report suggests that this provision was meant "to exempt transfers between affiliated entities, whether the purchasing entity is controlled by, controlling, or under common control with the selling entity by virtue of stock ownership, other equity or debt ownership or management control.[24] We ask commenters to indicate what other inter-company transfers should be included within this exception. We note that we interpret this provision as not requiring a new three-year holding period to commence following each transfer to an affiliated entity. We thus tentatively conclude that the acquisition date following a transfer between affiliated entities should relate back to the original date such system was constructed or acquired by the affiliated transferor.

18. Finally, it is our initial view that cable operators seeking to transfer ownership of a cable system prior to the expiration of the statutory three-year holding period should submit to the franchise authority all information necessary to support a certification that the proposed transfer satisfies one of the stated exceptions. We ask commenters to indicate what types of information should be required in order to establish eligibility under each of these exceptions.

19. *Waivers.* The 1992 Cable Act empowers the Commission, consistent with the public interest, to waive the three-year holding requirement. The Commission is specifically directed to use its waiver authority to permit "appropriate transfers in cases of default, foreclosure, or other financial distress." It is unclear whether Congress intended to grant the Commission general waiver authority, while specifying certain conditions in which the Commission should exercise its waiver authority, or whether Congress intended to limit the Commission's waiver authority to only those specific circumstances. We seek comment on which interpretation Congress intended. If the Commission is granted general waiver authority by this provision, we request comment on whether we should establish specific waiver cri-

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[21] We note that we do not believe that the date of acquisition should be effected by "installment" or "stepped" transactions, where either payment or transfer of ownership is incremental. In our view, the date of acquisition in such incremental transactions should relate back to the date of the transaction that initially transfers control as ultimately defined in this proceeding.

[22] 47 C.F.R. § 73.3597 (b).

[23] We note that the one-year broadcast holding period, contained in Section 73.3597 (a) of the Commission's Rules includes, *inter alia*, an exemption for transactions involving an assignment or transfer to a minority owned or minority controlled entity.

[24] House Report at 119.

teria regarding the types of showing that would be required in connection with waiver requests. In addition, the 1992 Cable Act does not define the term "financial distress." Commission Rules currently provide an exception to the one-year broadcast holding period where a broadcast station establishes that because of the unavailability of capital a proposed assignment or transfer would satisfy the public interest.[25] We ask whether this or some similar criterion should be used to define "financial distress" in this context.

20. If the approval of the franchise authority is required, the 1992 Cable Act provides that the Commission shall not waive such requirements unless the franchise authority has approved a proposed transfer. We propose that in such circumstances, the Commission may nonetheless grant waivers prior to franchise authority consideration, provided such waivers are contingent upon ultimate approval by the franchising authority. We believe that such procedures are consistent with Congressional intent and will enhance the speed and efficiency of the waiver process. We ask commenters to indicate whether such conditional waivers would be appropriate under the 1992 Cable Act. We also ask commenters to indicate whether franchise authority approval should create a presumption that the Commission will grant a waiver authorizing a particular transfer.

21. *Limitation on Duration of Franchise Authority Power to Disapprove Transfers.* Subsection (e) of the anti-trafficking rule limits the amount of time that a franchising authority has to disapprove a transfer of a cable system. After the initial 36-month period following the construction or acquisition of a cable system, the franchise authority has 120 days to act upon a request for transfer of such system, if franchise authority approval is required. If the franchise authority fails to act within 120 days, such request shall be deemed granted, unless the requesting party and the franchise authority otherwise agree.

22. Subsection (e) also indicates that the Commission will establish regulations establishing the information that will be required in connection with such a request for transfer. The language of the 1992 Act implies that the 120-day approval period will not commence unless a transfer request is accompanied by all information that the Commission requires in connection with such transfer requests. The 1992 Cable Act does not specifically direct the Commission to adopt regulations establishing informational requirements in connection with transfer requests. The Conference Report, however, indicates that the 120-day period will not apply to any transfer request prior to Commission adoption of such regulations.[26]

23. We seek comment regarding what type of informational requirements the Commission should establish in connection with transfer requests. The House Report suggests that such information requirements may include detailed financial information showing the effect of the proposed transfer on rates and service in the franchise area, all contracts and agreements underlying the proposed sale or transfer; information concerning the legal, technical and financial qualifications of the proposed transferee; and information concerning the transferee's plans regarding expansion or elimination of services.[27] The franchise authority may also in its discretion ask for such other information as it deems appropriate in evaluating the effects of a proposed transfer. We question whether such extensive information is necessary in connection with every transfer of a cable system. We request comment on what types of information are necessary for franchise authorities to evaluate requests for approval of transfers or assignments of cable systems. We seek to establish a minimum standard for such informational requirements and allow franchise authorities to request any additional information that may be necessary to evaluate a particular transfer.

IV. MMDS/SMATV CROSS-OWNERSHIP PROHIBITION

24. Section 11 of the 1992 Cable Act amends Section 613(a) of the Communications Act of 1934, as amended, to add a prohibition against common ownership of a cable system and either a multichannel multipoint distribution (MMDS) or a satellite master antenna television (SMATV) service in its franchise area.[28] Specifically, the statute provides that a cable operator may not hold a license for MMDS service or offer SMATV service that is separate from and in addition to its franchised cable service in the franchise area served by its cable system. This provision is intended to address Congress' concern that common ownership of different means of video distribution may reduce service competition.[29]

25. We have already adopted regulations implementing a cable/MMDS cross-ownership prohibition in a recently concluded rulemaking initiated to facilitate the provision of "wireless cable" service[30] to the public.[31] The fundamental purpose of that proceeding coincides with that underlying Congress' promulgation of the subject cross-ownership prohibition: "to enhance the potential of wireless cable as a competitive force in the multichannel video distribution marketplace."[32] The recently adopted rules "prohibit, directly or indirectly, ownership interests in, control of, or leasing of ... MMDS ... by cable television companies in geographic areas which overlap the ... MMDS protected service areas ... for cable franchise areas lacking two or more competing cable television companies."[33] Our current rules include the attribution rules and definitions of "control," "areas" and "overlap" necessary to effectuate this prohibition. (47 C.F.R. §21.912.) Our rules also provide for limited exceptions to the general prohibition which the Commission has already determined will be

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[25] 47 C.F.R. § 73.3597(a)(4).

[26] Conference Report at 83.

[27] House Report at 120.

[28] The new section is designated as Section 613(a)(2). *See* 47 U.S.C. § 533(a). This provision is self-executing and became effective on December 4, 1992 (the effective date of the 1992 Act).

[29] Senate Report at 46.

[30] Wireless cable is a multichannel video service that is similar to cable television in the type of programming it provides, but differs from cable in that it uses designated microwave radio channels rather than hardwire to transmit that programming to subscribers.

[31] *Report and Order* in Gen. Docket Nos. 90-54 and 80-113, 5 FCC Rcd 6410 (1990); *Order on Reconsideration* in Gen. Docket Nos. 90-54 and 80-113, 6 FCC Rcd 6764 (1991); *Second Report and Order* in Gen. Docket No. 90-54, 6 FCC Rcd 6792 (1991).

[32] *Second Report and Order* in Gen. Docket No. 90-54, 6 FCC Rcd 6792, 6793 (1991).

[33] *Order on Reconsideration* in Gen Docket Nos. 90-54 and 80-113, 6 FCC Rcd 6764 at para. 55 (1991).

in the public interest, *i.e.*, a exception for rural areas (47 C.F.R. §21.912(d)(1) and an exception for local programming (47 C.F.R. §21.912(e)).

26. We believe these recently adopted rules are consistent with and effectively implement the cross-ownership prohibitions of the 1992 Cable Act as regards the MMDS service.[34] We believe the same rules and their implementing criteria are appropriate for the cross-ownership prohibitions as they relate to SMATV. Commenters are invited to address these tentative conclusions. We note that in the wireless cable rule making, we rejected the use of the broadcast attribution rules for this provision. In light of our recent protracted rule making efforts on this issue, we do not believe it is necessary or appropriate to reopen this issue as it pertains to MMDS (and SMATV) cross-ownership restrictions.[35] We also observe that the legislative history indicates that this provision is not intended to prevent the common ownership of a SMATV system that itself qualifies as a "cable system" under section 602(7)[36] of the Communications Act of 1934, as amended, and a second separate stand-alone SMATV system.[37]

27. The 1992 Cable Act provides for the grandfathering of cross-ownership situations that already existed on October 5, 1992 (the enactment date of the 1992 Cable Act).[38] We note that the current Commission Rules grandfathered those cable/MMDS cross-ownership interests that existed on their effective date. In view of our tentative position that our existing rules fulfill the 1992 Cable Act's mandate with respect to MMDS, we propose to continue to grandfather only those cable/MMDS cross-ownership interests. No additional cable/MMDS cross-ownership relationships would be grandfathered pursuant to the terms of the 1992 Cable Act in any event. By contrast, cable/SMATV cross-ownership interests will be grandfathered as of October 5, 1992. Furthermore, the 1992 Act permits the Commission to waive the statutory prohibition against cable/MMDS and cable/SMATV cross-ownership to the extent that we determine that cross-ownership is needed to ensure that all significant portions of a franchise area are able to obtain video programming.[39] We request comment on whether the existing public interest waiver standard for cable/MMDS situations is sufficient or whether we should establish additional rules or criteria for such waivers in the context of this proceeding. If we adopt such criteria, what types of information would be needed to indicate that cross-owned systems serving the same franchise area provide the only means to distribute multichannel video program service to the public? Finally, we note that the rules and procedures specified in Section 76.7, the special relief rules, are applicable for the filing of most requests for waiver of the cable television rules. Should waivers of these cross-ownership rules also be subject to these provisions? Are there any modifications needed to implement these specific cross-ownership waiver requests?

28. The 1992 Cable Act does not address enforcement of this cross-ownership provision nor require the Commission to monitor ownership in this regard. With respect to enforcement, we believe that the Commission should establish procedures for consideration of complaints. We ask for comment regarding what procedures should be adopted to allow participation by all interested parties. We also seek comment on whether we should apply the provisions of Section 76.7 of the Commission's rules (the special relief rules), or some modified form of these procedures, in such cases.[40] (Alternatively, cable operators could be required to provide information regarding ownership of MMDS services or SMATV systems in filings required of cable systems, such as the annual Form 325 or on CARS license applications.[41] We ask commenters to consider whether this type of reporting requirement is necessary. We seek to develop the least burdensome approach that is consistent with ensuring compliance. In this regard, we request suggestions regarding the specific information that would be useful should a reporting requirement be deemed necessary.

V. SUBSCRIBER LIMITS

29. Seeking to enhance competition in the development, acquisition and delivery of video programming, Section 11 of the 1992 Act requires the Commission within one year to conduct a proceeding to establish horizontal ownership limits. Specifically, Section 11 requires the Commission to "prescribe reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person or in which such person has an attributable interest."[42]

30. In establishing subscriber limits, as well as the other ownership limits mandated by Section 11, the 1992 Cable Act directs the Commission to consider the following public interest objectives of the legislation: (A) to ensure that no cable operator or group of cable operators can unfairly impede the flow of video programming from the programmer to the consumer; (B) to ensure that cable operators do not favor affiliated video programmers in determining carriage and do not unreasonably restrict the flow of video programming of unaffiliated video programmers to other video distributors; (C) to take account of the market structure, ownership patterns, and other relationships of the cable industry, including the market power of the local

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[34] We have not determined whether, and to what extent, the existing cable/MMDS cross-ownership rules and the 1992 Cable Act cross-ownership restriction apply to Local Multipoint Distribution Service ("LMDS"). This issue is addressed more fully and comments are requested in the *Notice of Proposed Rulemaking* in CC Docket 92-297, released December 10, 1992.

[35] In its discussion of horizontal concentration and vertical integration, the Senate Report indicates that it is the "intent of the Committee that the FCC use the attribution criteria set forth in Section 73.3555 (notes) or other criteria the FCC may deem appropriate." *See* 47 C.F.R. § 73.5555, the ownership attribution rules for broadcast stations.

[36] 47 U.S.C. § 522 (7).

[37] Senate Report at 81.

[38] 47 U.S.C. § 533 (a)(2)(A).

[39] 47 U.S.C. § 533 (a)(2)(B).

[40] In particular, we note that Section 8 of the Communications Act of 1934 as amended requires parties filing requests for special relief in the cable area to pay filing fees, yet mass media enforcement actions are generally exempt from the fee requirement. *See* 47 U.S.C. § 158. *See also* 47 C.F.R. § 76.7.

[41] For example, these forms could be amended to require certification that the cable operator is in compliance with the rules or they could require more specific information regarding actual ownership of these media.

[42] 47 U.S.C. § 533 (f)(1)(A).

franchise, joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests; (D) to take into account any efficiencies and other benefits that might be gained through increased ownership or control; (E) to ensure that such rules and regulations reflect the dynamic nature of the communications marketplace; (F) to impose limitations that *will not prevent cable operators from serving previously unserved rural areas; and (G) to impose limitations that will not impair the development of diverse and high quality programming.[43] In commenting on the provisions of Section 11, commenters are urged to consider these objectives.

31. The establishment of subscriber limits is intended to address Congress' concern regarding increasing horizontal concentration in the cable industry. Horizontal concentration in this context is based on the share of subscribers served by individual cable companies through their ownership or control of local cable systems. The Senate Report noted that TCI, the nation's largest cable operator, serves 14.3 million subscribers (about 24% of the nation's cable subscribers), Time-Warner reaches about 6.4 million subscribers (12% of the nation's subscribers) and the next three largest MSOs, Continental, Comcast and Cox, together control about 5.8 million subscribers (11% of the nation's subscribers).[44] According to information provided to Congress, the top five firms thus serve almost half of the nation's cable subscribers. Congress concluded that this degree of concentration, though low relative to other industries, may enable some MSOs to exercise excessive market power, or monopsony power, in the program acquisition market.[45]

32. In the 1992 Cable Act, Congress found that the increased concentration in the cable industry had the potential to create barriers to entry for new programers and to reduce in the number of media voices available to consumers.[46] Although under traditional antitrust analysis the cable industry is relatively unconcentrated, the 1992 Cable Act requires the Commission to establish limits on the number of subscribers a single entity can reach through cable systems owned by such person.[47] The Conference report is silent regarding what shall constitute reasonable limits for this purpose. The House Report, however, suggests that antitrust analysis should not be the sole measure of concentration in the cable industry.

33. The Commission's own analysis regarding horizontal concentration also concluded that the cable industry has become increasingly concentrated. In its 1990 Report to Congress, the Commission noted that in 1989 the two largest MSOs together served almost 34% of all cable subscribers nationwide, and that the top 10 cable companies served 32.9 million of the nation's 53 million subscribers.[48] We indicated that this degree of concentration among companies that frequently enjoy a monopoly franchise raised "the question of whether MSOs (particularly the largest MSOs) have attained sufficient market power to extract unreasonable concessions from program suppliers and to unfairly restrain competition from alternative distribution services."[49] The Commission also indicated that, on the local level, relatively few cable operators face competition from other multichannel video distributors for either programming or subscribers.[50] In fact, we concluded that it was this level of local concentration that provided MSOs with the potential to take anticompetitive action against programming services and competing multichannel providers.[51]

34. On the other hand, the Commission indicated in its *1990 Cable Report* that consolidation in the cable industry produced significant benefits and efficiencies to consumers.[52] We noted that higher concentration levels enabled cable companies to take advantage of economies of scale and foster investment in more and better original programming and a wealth of viewing options for consumers. Further, we found that the growth of MSOs had produced significant efficiencies in administration, distribution and procurement of programming which can promote the introduction of new programming services. The Senate Report similarly acknowledged that horizontal concentration may reduce programmers' transaction costs by eliminating the need for negotiation with each of thousands of local cable systems throughout the country.[53] Congress also recognized that horizontal concentration may help promote the introduction of new services into an increasingly competitive programming market by providing capital and a ready subscriber base for such new services.[54]

35. In prescribing subscriber limits, we must, as a preliminary matter, determine the markets in which such subscriber limits should be established. Horizontal concentration may be measured on a local, regional or national basis. The legislative history of the 1992 Cable Act focuses upon the establishment of national subscriber lim-

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[43] 47 U.S.C. § 533 (f)(2).

[44] The Committee's statistics are derived from Paul Kagan Associates data and were current as of 1990. More recent data regarding the number of subscribers reached by the 100 largest MSOs can be obtained by reference to Warren Publishing, Inc., Television & Cable Fact Book, Cable & Services Volume No. 59 (Services-Part III), 1992 Edition, p. C-389.

[45] House Report at 42-43.

[46] 1992 Cable Act, Section 2 (a)(4).

[47] Under the two prevailing measures of market concentration -- the four firm concentration ratio ("Four Firm Ratio") and the Hirfindahl-Hirschman Index ("HHI"), the cable industry is not concentrated. The Four Firm Ratio measures the percentage of the market captured by the four largest companies in the market. The HHI reflects the distribution of market share among all firms in a given market, giving proportionately greater weight to the market shares of the larger firms. A market is generally considered concentrated when one firm, or a small group of firms, has a sufficient share of the market to exercise power over it. The Justice Department considers an industry concentrated when the HHI exceeds 1800 (although an HHI that exceeds 1000 prompts further evaluation) or when the four firm ratio exceeds 50%. According to the House Report, the HHI for the top 20 MSOs is 491 and the Four Firm ratio for the largest MSOs is 36%, well below the Justice Department's threshold. *See* House Report at 42.

[48] *Report* in MM Docket No. 89-600, 5 FCC Rcd 4962, 5005 (1990) ("*1990 Cable Report*").

[49] *Id* at 5003.

[50] *Id.* at 5004.

[51] *Id* at 5006. In view of our finding in the *1990 Cable Report*, we seek comment regarding whether it would be appropriate in calculating compliance with the national subscriber limits to subtract the number of subscribers reached or homes passed by cable systems in areas where effective competition is established.

[52] *1990 Cable Report* at 5009.

[53] Senate Report at 33.

[54] House Report at 43.

its, although regional concentration is also mentioned.[55] In the *1990 Cable Report,* we concluded that the level of national concentration in the cable industry was not sufficient to warrant regulatory intervention. We nonetheless indicated that "some cable networks operate on a regional rather than a national basis and an MSO could be sufficiently concentrated to occupy an anticompetitive position at the regional level without possessing a large enough market share to disrupt the national markets."[56] Commenters are asked to indicate whether regional or national subscriber limits, or both, are necessary or appropriate to implement the objectives of the 1992 Cable Act.

36. The Cable Act of 1992 does not define the term "reach" in the context of subscriber limits. Thus, the Commission may prescribe subscriber limits either as a share of cable subscribers or as a share of homes passed. Commenters should address which of these measures should be 8used to implement the subscriber limits established in this proceeding. We recognize that subscriber-based measures have traditionally been used for purposes of analysis. Nonetheless, we believe that homes passed may be a more appropriate and practical measure for this purpose, since it encompasses all television households for which a particular cable operator provides access to cable programming. Moreover, existing Commission rules applicable to cable/network cross-ownership apply a homes passed measure to implement both national and local subscriber limits.[57] In the *Cable/Network Order,* we determined that use of a homes passed measure was preferable because a subscriber-based limit could discourage systems from adding new subscribers. We observed that a homes passed measure would be more stable than a subscriber based limit, given the frequent changes in cable subscribership. For the foregoing reasons and to provide consistency in the interpretation of our rules, we tentatively propose to use a homes passed measure to implement the cable subscriber limits established in this proceeding. We seek comment on this proposal.

37. Commenters are also asked to indicate what percentage of homes passed nationally would constitute a reasonable limit on horizontal concentration. Considering the existing market structure and ownership patterns, and the efficiencies and economies of scale resulting from horizontal relationships, we ask whether a limit in the range of 25% to 35% of homes passed would be reasonable or whether some other percentage would be more appropriate. In this regard, commenters should indicate at what percentage of homes passed a single MSO could preclude the success of a new cable service. Are there recent examples of this type of conduct? How many subscribers must be cleared nationally to launch and sustain a new cable programming service? Does the number of subscribers needed vary depending on the type of programming involved? Is it relevant that the Commission's broadcast multiple ownership rules limit the audience reach of television stations in which a person can hold an attributable interest to 25% of television households nationwide[58] Is it relevant that Commission Rules permit national television networks to own cable systems which reach 10% of the homes passed nationally? This 10% limitation applicable to network-owned cable systems takes into consideration the national audience reach and ability to control programming associated with a broadcast network and, therefore, may not be particularly relevant in the context of crafting national ownership limits for non-network-owned cable systems. It is also important to note that the Senate Report indicates that the 1992 Cable Act was not intended to imply that any existing MSO must be divested.[59] Accordingly, commenters are asked to indicate whether divestiture should be required in connection with the subscriber limits we ultimately adopt.

38. The 1992 Cable Act and the Conference Report are silent regarding the appropriate standard for determining ownership of cable systems in connection with application of the subscriber limits. The Senate Report, however, indicates that the Commission should use the attribution criteria set forth in Section 73.3555 (Notes) of our Rules, or such other criteria as the Commission deems appropriate in determining ownership for purposes of applying the subscriber limits.[60] The attribution criteria contained in Section 73.3555 of our Rules may be useful for determining ownership in connection with the subscriber limits we ultimately establish.[61] It should be noted, however, that these attribution criteria were intended to include ownership thresholds which may impart the ability either to influence or control management or programming decisions of a broadcast licensee, and consequently these criteria may not be appropriate to address the concerns at issue in this proceeding. We seek comment regarding whether these attribution criteria (or a modified version thereof) are appropriate for implementing cable subscriber limits or whether some other attribution criteria would be more suitable. In this regard, commenters should also indicate if there are other types of ownership interests, such as non-equity interests, that should be cognizable for purposes of determining ownership under this provision.

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[55] Senate Report at 32-3.

[56] *1990 Cable Report,* 5 FCC Rcd at 5006.A

[57] 47 C.F.R. § 76.501 The cable/network restriction was recently relaxed to allow national networks to own cable systems, provided that no such combination exceeds 10% of homes passed by cable nationwide or 50% of homes passed by cable within an ADI. *See Report and Order* in MM Docket No. 82-434, 7 FCC Rcd 5781 (1992) (*"Cable/Network Order"*)(petitions for recon. pending).

[58] 47 C.F.R. § 73.3555. This section also provides for increased ownership of broadcast stations representing up to 30% of the television households nationwide if the additional stations are minority owned. We seek comment on whether we should adopt a similar provision in the cable context. The Commission currently has pending a *Notice of Proposed Rulemaking* in MM Docket No. 91-221 which proposes to relax or eliminate the national audience reach limits applicable to broadcast television. 7 FCC Rcd 4111 (1992).

[59] Senate Report at 34. According to the recent data from Warren Publishing, Inc., Television & Cable Fact Book, Cable & Services Volume No. 59 (Services-Part III), 1992 Edition, p. C-389, TCI, the nation's largest MSO, currently reaches 24% of homes passed nationally, and thus it appears that divestiture would not be required if the limit set is within our suggested range of 25% to 30% of homes passed (or higher).

[60] Senate Report at 80.

[61] In the event that we increase the attribution threshold or otherwise modify the attribution criteria as proposed in the Capital Formation Proceeding, commenters should indicate whether we should similarly modify those criteria for purposes of the cable ownership rules.

39. *Jurisdiction and Enforcement.* The 1992 Cable Act does not specifically address how subscriber limits are to be monitored and enforced. In considering this issue it is important to note that presently few if any cable systems are in the range of the proposed subscriber limits. Moreover, subscriber information is publicly available from numerous sources. Consequently, we tentatively conclude that reporting requirements may be unnecessary in connection with enforcing the subscriber limits we ultimately adopt. In the alternative, we believe that a system of certification would be an appropriate means of enforcing the subscriber limits imposed. For example, we could propose requiring cable operators upon transfer or assignment of a cable system to certify that such transfer will not result in ownership of cable systems exceeding the subscriber limits established by the Commission. We seek comment regarding whether such a certification should be made to the local franchise authority, having jurisdiction over the cable system being acquired, or to the Commission. If a system of certification is appropriate, we request comment on whether all cable systems should be required to make the requisite certification or only the five or ten largest cable systems. We also request comment on whether such a certification is necessary at all. Alternatively, we may enforce the subscriber limits on a complaint only basis, pursuant to which parties believing that a particular acquisition would result in a violation of the subscriber limits, would notify the local franchise authority of the acquiring station of the potential violation. We seek comment on these proposals and ask commenters to indicate if there are other more appropriate procedures to enforce the subscriber limits. We also seek comment on whether waivers or exceptions to the subscriber limits should be obtainable in appropriate circumstances. For example, should waivers be granted allowing additional ownership interests for cable systems that expand existing systems to previously unserved rural areas?

40. The Senate Report states that because the cable market is dynamic, the Commission should revisit these limitations at appropriate times to ensure that they continue to accurately reflect the objectives of the legislation.[62] We believe that periodic review of the ownership limits is important to the continued growth and development of the cable industry. Consequently, we propose to institute a review of the subscriber limits every five years to determine whether such limits are reasonable under the prevailing market conditions. Commenters are asked to indicate whether such review procedures are adequate to ensure that subscriber limits continue to serve the objectives for which they were established.

VI. CHANNEL OCCUPANCY LIMITS

41. Section 11 of the 1992 Cable Act requires the Commission within one year to "prescribe reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest."[63] Vertical integration in this context refers to common ownership of both cable systems and program networks, channels, services or production companies.

42. In the 1992 Cable Act, Congress concluded that the cable industry has become vertically integrated and that cable operators have the ability and the incentive to favor their affiliated programmers. Such concentration, Congress determined, could make it difficult for non-cable affiliated programmers to secure carriage on cable systems.[64] Similarly, Congress found that, vertically integrated program suppliers also have the incentive and the ability to favor their affiliated cable operators over nonaffiliated operators and program distributors using other technologies.[65] The Senate Report noted that Viacom owns programming services such as MTV, Showtime and Nickelodeon, and that TCI has financial interests in American Movie Classics, the Discovery Channel, QVC and Encore.[66] In addition, the House Report stated that according to a study by the National Cable Television Association, 39 of the 68 nationally delivered cable video networks have some ownership affiliation with the operating side of the cable industry.[67]

43. With respect to channel occupancy limits, Congress sought to reduce the incentive and ability of cable operators to favor their affiliated programming services to the disadvantage of unaffiliated programmers. Similarly, Congress intended to discourage vertically integrated programming services from favoring their affiliated cable operators over other cable operators and multichannel video providers. According to the House Report, some vertically integrated MSOs favor programming services in which they have an ownership interest, denying system access to programmers affiliated with rival MSOs. Such vertically integrated MSOs may also discriminate against rival programming services with regard to price, channel positioning, and promotion.[68] In addition, Congress was concerned that vertical integration limits diversity of cable programming and reduces the number of voices available to the public. In this respect, the Senate Report likens the channel occupancy limits to the Commission's broadcast one-to-a-market rule, which are similarly designed to increase the diversity of voices available to the public.[69]

44. On the other hand, the House Report cites a 1988 study by the National Telecommunications and Information Administration ("NTIA"), which concluded that common ownership of cable systems and cable programming services did not appear to affect adversely the supply of cable programming or diversity of viewing choices for cable subscribers.[70] NTIA found that none of the top five MSOs showed a pattern of favoring basic services with which they were affiliated. Congress also acknowledged that significant benefits have resulted from vertical relationships in the cable industry. In particular, Congress cited C-Span, CNN, Black Entertainment Television, Nickelodeon, and

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[62] *Id.* at 80.
[63] 47 U.S.C. § 533 (f)(1)(B).
[64] Cable Act of 1992, Section 2 (a)(5).
[65] *Id.*
[66] Senate Report at 25.
[67] House Report at 41.
[68] *Id* at 43.
[69] Senate Report at 80. The one-to-a-market rule is contained in Section 73.3555 of the Commission's Rules.
[70] House Report at 41, *citing Video Program Distribution and Cable Television: Current Policy Issues and Recommendations*, NTIA Report 88-223, June 1988, p. 102.

the Discovery Channel as examples of innovative programming that would not have been feasible without the financial support of cable system operators.[71]

45. In preparing the *1990 Cable Report,* we requested and obtained data from nine of the major MSOs regarding the nature and degree of their attributable ownership interests in cable programming services. The data we obtained were current as of December 31, 1989, and are contained in Appendix G to the *1990 Cable Report.*[72] In the *1990 Cable Report,* we indicated that TCI owned equity interests in 22 cable networks, Time Warner held interests in eight cable networks and Cox Cable had equity interests in six cable programming services.[73] Overall, we found that MSOs had equity interests in 13 of the top 20 national basic cable networks and in six of the top eight pay cable networks.[74] We concluded that vertical integration had accelerated in the cable industry, but that such vertical relationships had increased both the quality and quantity of cable programming services. We found that MSO investment was responsible for the development and survival of many of the most popular programming services. We also determined that vertical integration of MSOs with significant subscribership has contributed to program diversity by providing new programming services with financial support, an extensive subscriber base and information regarding viewer taste and desire for new programming.

46. The 1992 Cable Act does not indicate the ownership standard that should be applied in connection with channel occupancy limits. The Senate Report indicates that the Committee intended for the Commission to use the attribution criteria set forth in Section 73.3555, or such other criteria as the Commission may deem appropriate in implementing channel occupancy limits. We request comment on whether the attribution criteria contained in Section 73.3555 of our Rules, which are designed to identify ownership interests that afford influence or control over station operations or programming, are appropriate for this purpose. Commenters should indicate whether any modifications should be made for purposes of determining ownership affiliations between cable operators and program services. Commenters are asked to address how application of these attribution rules would affect investment by cable operators in new cable programming services. Parties also are asked to indicate whether higher attribution thresholds are warranted in connection with this restriction in order to provide cable operators with the flexibility to continue investing in new cable programming services.[75]

47. We seek comment on the procedures that should be used in calculating the cable channel occupancy limits we ultimately adopt. The 1992 Cable Act and its legislative history are unclear on this issue. The Senate Report suggests that the Commission may establish such limits based on the number of activated channels, less the number of over-the-air broadcast channels, public, educational, governmental and leased access channels carried. Under this approach, using a hypothetical 20% channel occupancy limit, a system with 54 channels, 14 of which are over-the-air channels, would have a channel occupancy limit of 8 channels for MSO affiliated programming.[76]

48. Parties are requested to comment on whether the procedures for calculating channel occupancy limits outlined in the Senate Report are appropriate and reasonably serve the objectives of the legislation. In addressing this issue, commenters should consider that one of the objectives of vertical ownership limits is to ensure that unaffiliated cable programmers have a reasonable opportunity to gain access to vertically integrated cable systems. In this regard, we question whether it is appropriate to subtract the over-the-air broadcast channels and public, educational, governmental and leased access channels in calculating a system's channel capacity. Broadcast channels contain programming that is competitive with cable programming, and leased access channels provide alternative outlets for unaffiliated video programmers. In addition, the commercial and educational broadcast channels are subject to must-carry requirements, pursuant to Section 4 of the 1992 Cable Act. To the extent that carriage of these signals is mandatory, we question whether it is appropriate for such channels to be subtracted from the total number of channels in calculating channel occupancy limits. We seek comment on how such a procedure would serve the statutory objectives of increasing diversity and expanding the number of cable voices available to consumers. We further seek comment regarding how pay channels, such as HBO, Showtime and pay-per-view channels, should be treated for purposes of calculating the channel occupancy limits, since not all subscribers receive these channels. In addition, what provisions should be made for "multiplexing" of pay channels, where the same programming is shown on several different channels at different times? Commenters should also indicate whether channel occupancy limits apply only to vertically integrated national programming networks, or whether such limits should also apply to vertically integrated regional programming networks.

49. It is also unclear from the statutory language and the legislative history how Congress intended such channel occupancy limits to be applied. For example, it is unclear whether such limits were meant to apply only to video programmers affiliated with the particular cable operator or whether such limits were intended to apply to any cable affiliated video programer. It is similarly unclear if the latter interpretation is used, whether the channel occupancy limit should be applied so that a total of eight channels could be occupied by all vertically integrated programming combined or whether such a limit should be applied so that the programming of each MSO could occupy up to the maximum of eight channels on such a system. The Senate Report could be read to suggest that the channel occupancy limits should apply to the number of channels that any cable operator can devote to any vertically integrated programming, regardless of whether a programmer is affiliated with that particular cable operator.[77]

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[71] *Id.*

[72] *Id.* at 5106-5127.

[73] *1990 Cable Report,* 5 FCC Rcd at 5007.

[74] *Id.*

[75] In the event that we increase the attribution threshold or otherwise modify the attribution criteria as proposed in the Capital Formation proceeding, commenters should indicate whether we should similarly modify those criteria for purposes of the cable ownership rules.

[76] Senate Report at 80.

[77] *Id.*

Commenters are asked to indicate how the channel occupancy limits we ultimately adopt should be applied to most effectively address Congress' concerns.

50. Given the uncertainty surrounding the application of the channel occupancy limits, we believe that the more reasoned approach is to apply such limits only to video programmers affiliated with the particular cable operator. We note that such an interpretation would be consistent with Congress' objectives of increasing diversity and expanding the number of voices available to consumers. Moreover, such an interpretation addresses Congress' goal of reducing the ability and the incentive of cable operators' to favor their own affiliated video programmers. Commenters are asked to indicate whether this proposal is appropriate. In considering this issue, commenters should consider whether vertically integrated programing has an adverse effect on diversity. In this regard, we note that, as discussed in paragraph 45, vertical relationships between cable operators and programming services provide essential investment in the development of new programming and enables program producers to spread the risk of developing new and more innovative program services.

51. We also seek comment on how we should determine what constitutes a reasonable channel occupancy limit. What criteria should be used to establish such limits? Are there other regulatory analogies that would be useful in determining what percentage of a cable system's channels should be occupied by vertically integrated program services? In addressing this issue, commenters are asked to consider the vertical relationships and ownership patterns that were reported in Appendix G to the *1990 Cable Report*. Commenters are asked to provide relevant information, such as the average number of channels occupied by vertically integrated program services. We also request comment on how the availability of leased access channels should affect the establishment of channel occupancy limits. Commenters are asked to indicate the degree to which vertical integration threatens the ability of rival programming services to obtain cable carriage. We note that our intention is to establish a channel occupancy limit that maximizes the number of voices that are available to cable viewers without impairing the ability or incentive of cable operators to invest in new and existing programming services. In this regard, we note that MSO investment has been essential to the development and continuation of many of the most popular and innovative programming services.

52. We tentatively conclude that we should establish a percentage limit on the number of channels that can be occupied by vertically integrated programming services. We ask commenters to indicate what percentage of cable channels would be most appropriate to prevent competitive abuses without discouraging investment relationships between cable operators and program services. In suggesting the appropriate percentage limit, commenters are asked to consider the other structural and behavioral restrictions included in Sections 12 and 19 of the 1992 Cable Act. These restrictions are similarly designed to prevent the adverse effects of vertical integration. Moreover, commenters should consider the must-carry[78] and leased access requirements[79] applicable to cable systems in commenting on this issue.

53. We also seek comment on what effect emerging technologies such as digital signal compression and fiber optic cable should have on the channel occupancy limits. Currently 64% of subscribers receive between 30 and 53 channels, while 28% of cable subscribers receive 54 or more channels.[80] Digital compression technology promises to dramatically expand the capacity of existing cable plant. Time Warner is currently testing a cable system with a 150 channel capacity and TCI recently announced plans to introduce a 500 channel system. We believe that such expanded channel capacity will eliminate the need for channel occupancy limits to ensure diversity and prevent discrimination against unaffiliated programming services. Cable systems with such dramatically expanded capacity will require programming from many different sources in order to program so many additional channels. Thus, we propose to establish a threshold beyond which the channel occupancy limits would no longer be applicable. We ask commenters to indicate the appropriate number of total channels for establishing such a threshold. Pursuant to this proposal, the channel occupancy limits would be applied so that a certain percentage of a system's channels could be occupied by vertically integrated programming up to the threshold number of channels, with no limits applicable for channels in excess of the threshold. We believe that this approach is consistent with the objectives of the 1992 Cable Act -- to ensure that the regulations prescribed reflect the dynamic nature of the communications marketplace and do not impair the development of diverse and high quality video programming.[81]

54. Finally, we seek comment on whether channel occupancy limits should be phased out in communities where effective competition has developed. Once effective competition has been established and a cable operator no longer occupies a program access bottleneck position, channel occupancy limits may no longer be necessary or desirable. With such developments, the incentive and ability of a cable system to favor its own programming over unaffiliated programming is diminished, and alternative outlets for programming should be available to the public. In seeking comment on this issue, we ask whether phasing out channel occupancy limits under these conditions is consistent with Congressional intent. In addition, we ask whether channel occupancy limits should be lifted for any cable system that meets the effective competition criteria, or whether only certain of those criteria would justify removing the limits.

55. *Jurisdiction and Enforcement.* The 1992 Cable Act and its legislative history are silent on the issue of enforcement of the channel occupancy limits. We propose that the local franchise authorities have primary responsibility for enforcement of such limits, since they are most familiar with the channel capacity and programming services carried on the systems within their jurisdiction. Because we seek to minimize the burden imposed on local franchise authorities and cable operators by these restrictions, we propose

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[78] 47 U.S.C. § 534.
[79] 47 U.S.C. § 532.
[80] Warren Publishing, Inc., Television & Cable Fact Book, Cable & Services Volume No. 59 (Services-Part III), 1991 Edition, p. C-389.
[81] 47 U.S. C. § 533 (f)(2)(E) and (G).

that such channel occupancy limits should be enforced by certification. Accordingly, cable operators would be required to certify annually to the franchise authority that they are in compliance with the channel occupancy limits ultimately adopted. In order to ensure continuous compliance, cable operators would be obligated to notify the franchise authority within 30 days of any changes during the course of the year which would affect compliance with the channel occupancy restrictions. In addition, a franchise authority would be entitled to request any additional information it reasonably determined to be necessary to establish the accuracy of a system's certification, if such certification was challenged. We believe that such a system of certification is appropriate to enforce the channel occupancy limits and will avoid unduly burdening local franchise authorities and cable operators. We also propose to grandfather any existing vertical relationships which exceed the channel occupancy limits at the time such limits are adopted. We believe that divestiture or deletion of programming in connection with implementation of these channel occupancy limits is not required by the 1992 Act and may result in unnecessary disruption of service to the public. We seek comment on this proposal and on whether these procedures are appropriate to ensure compliance with the channel occupancy limits.

VII. PARTICIPATION IN PROGRAM PRODUCTION

56. Section 11 of the 1992 Cable Act also requires the Commission to consider the necessity and appropriateness of imposing limitations on the degree to which multichannel video programming distributors ("multichannel distributors") may engage in the creation or production of video programming. Congress included this provision in response to the same concerns regarding vertical and horizontal integration discussed above. Thus, in considering whether such limits are necessary or appropriate, we must also consider the degree to which these concerns are already addressed by other rules and regulations established in the 1992 Cable Act.

57. As previously stated in this *Notice*, the 1992 Act mandates that the Commission establish certain structural limits on the development of horizontal and vertical integration in the cable industry. These limits are intended to promote diversity and to encourage competitive dealings between cable programming services and cable operators and between cable programming services and competing video distributors. Channel occupancy limits, in particular, restrict the ability and the incentive for cable operators to favor programming services in which they have an attributable interest. Such structural limits also limit the ability of operators or group of cable operators to impede the entry of new programming services.

58. In addition to the structural limits addressed in this proceeding, the 1992 Cable Act establishes certain behavioral restrictions which prohibit anticompetitive conduct by cable operators in the acquisition of programming. For example, Section 12 of the 1992 Cable Act prohibits cable operators from requiring either exclusive rights or a financial interest in programming services as a condition of carriage. Moreover, Section 12 of the 1992 Act prohibits cable operators from discriminating against unaffiliated programmers in the selection, terms and conditions of carriage.

59. In order to further encourage the development of competition and diversity in video programming distribution, Section 19 of the 1992 Act prohibits cable operators and programming vendors that are vertically integrated with cable operators from engaging in "unfair" or "deceptive" practices that would hinder competition in cable service and programming or inhibit delivery of programming to consumers. In addition, Section 19 directs the Commission to prescribe regulations to specify particular conduct that is prohibited in selling programming to cable systems or programming distributors. At minimum, the FCC regulations are to establish effective safeguards to prevent a cable operator with an attributable interest in a programming vendor from: (1) unduly or improperly influencing the vendor's decision to sell, or the prices or terms of sale of programming to an unaffiliated multichannel programming distributor; (2) discriminating in the prices, terms, and conditions of sale or delivery of programming among or between cable systems, other multichannel video distributors, or their agents; and (3) establishing exclusive arrangements or contracts for programming. Section 19 also specifies several exceptions that could cause permissible differentials in prices and terms in selling or delivering programming, as well as considerations to permit exclusive contracts that are in the public interest for areas served by cable operators.

60. In view of the structural and behavioral restrictions already required under the 1992 Act, we seek comment on whether additional restrictions on the ability of Multichannel Distributors to engage in the creation or production of video programming are warranted. We believe that at the present time the objectives of such a restriction may be fully addressed by the other provisions of Section 11, Section 12, and Section 19 of the 1992 Cable Act. Commenters who believe that further restrictions are warranted should indicate what, if any, additional benefits would be achieved by imposing such additional restrictions and what effect they would have on the growth and development of new programming services.

VIII. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

61. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same deadlines as comments on the other sections of this *Notice of Proposed Rule Making*. However, such comments must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Notice of Proposed Rule Making* and regulatory flexibility analysis to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

B. Ex Parte

62. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. Sections 1.1202, 1.203, and 1.206(a).

C. Comments

63. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **February 9, 1993** and reply comments on or before **March 3, 1993.** To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Additional Information

64. For additional information on this proceeding, contact Jacqueline Chorney, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

1. **Reason for the Action:** The purpose of this *Notice* is to establish rules and regulations in accordance with the Cable Television Consumer Protection and Competition Act of 1992 relating to the development of horizontal and vertical Hownership limits and implementation of cross-ownership and Anti-trafficking provisions.

2. **Objective of this Action:** The 1992 Act and the subsequent actions to implement it are intended to encourage competition in the cable industry and prevent the exercise of undue market power by horizontally or vertically integrated cable systems. This action is meant to clarify and the interpretation and implementation of Sections 11 and 13 of the 1992 Act. This proceeding will codify the statutory anti-trafficking restriction and the cross-ownership restriction. This proceeding will also establish subscriber limits and channel occupancy limits required by the 1992 Act.

3. **Legal Basis:** Authority for the actions proposed in this *Notice* may be found in Sections 4, 303, 613 and 617 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, 533 and 537.

4. **Reporting, Record keeping, and Other Compliance Requirements Inherent in the Proposed Rule:** This *Notice* proposes to implement new certification and filing requirements applicable to cable systems, in order to ensure compliance with the proposed rules.

5. **Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule:** None.

6. **Description, Potential Impact and Number of Small Entities Involved:** Approximately 11,000 existing cable systems of all sizes may be affected by the proposals contained in this *Notice*. In addition, an unknown number of video programming sources may be affected.

7. **Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives:** The purpose of this *Notice* is to seek comment on issues including alternatives that would minimize the impact on small entities.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-162

In the Matter of

Evaluation of the Syndication and
Financial Interest Rules

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: December 31, 1992; Released: December 31, 1992

Comment Date: February 1, 1993
Reply Comment Date: February 16, 1993

By the Commission: Chairman Sikes issuing separate statement.

I. INTRODUCTION

1. On November 5, 1992, the U.S. Court of Appeals for the Seventh Circuit in *Schurz Communications, Inc., et al., v. FCC* (*Schurz*)[1] vacated this Commission's decision relaxing and modifying its financial interest and syndication rules.[2] The Court invalidated the Commission's decision except insofar as the Court found it to abrogate the original (1970) financial interest and syndication rules.[3] The Court stayed its decision for 120 days, remanding the matter to the Commission for further proceedings consistent with its ruling. In this *Second Further Notice of Proposed Rulemaking* we seek comment with regard to how we should resolve the Court's concerns.

II. BACKGROUND

2. The financial interest and syndication rules, originally adopted in 1970, were designed to limit the power of the broadcast television networks over television programming. The rules prohibited the television networks from acquiring any financial interests in the subsequent broadcast of outside produced programs (*i.e.*, programs not solely produced by the network) other than the right to exhibit such programs on the network. The rules also prohibited the networks from actively engaging in the domestic syndication business, or from having any ongoing interest in the syndication of programs for non-network broadcast distribution. Networks were allowed, however, to syndicate outside the United States programs that they solely produced or that were produced by foreign entities.

3. In 1991, this Commission determined, after an extensive notice and comment rulemaking proceeding and an *en banc* hearing, that it should relax, but not repeal the financial interest and syndication rules. Accordingly, the 1991 rules: (1) eliminated restrictions on network ownership and syndication of network programming as to all dayparts and all programs other than prime time entertainment programming; (2) allowed networks to retain all rights in all "in-house" productions; (3) permitted networks to fill up to, but not more than, 40 percent of their prime time entertainment schedule with "in-house" productions; (4) allowed networks to acquire all rights, including financial interests, domestic syndication rights and foreign syndication rights, in outside productions on their own or another network, subject to certain safeguards; (5) allowed networks to engage in foreign syndication of network programs without limitation; and (6) allowed limited network participation in first-run syndication. The Commission also adopted a new definition of "network" and imposed certain behavioral safeguards.[4]

III. DISCUSSION

4. The Court supported two important aspects of the Commission's reasoning in this proceeding. First, the Court agreed with the Commission's determination that the structure of the television industry has changed significantly since the financial interest and syndication rules were adopted in 1970. *Schurz* at 4. Second, the Court agreed that the Commission has the authority to regulate the networks in accordance with the public interest, convenience, or necessity and, thus, has the authority to restrict network programming activities so as to foster a diversity of programming sources and outlets even if the networks were without any market power. *Schurz* at 8-10.

5. The Court stated, however, that while the modified rules appear plausible, the decision did not address all the objections to the Commission's approach that were raised in the record of this proceeding. The Court concluded, therefore, that the Commission's justification for the 1991 rules was inadequate. The Court remanded the decision to give the Commission an opportunity to better articulate its justification. The Court opined that such a proceeding could result in significant modifications in the rules. *Schurz* at 12.

6. The Court identified several areas warranting further explanation. It stated that the Commission did not respond to the networks' objection that the 1991 rules do not increase the networks' access to the programming market and may decrease it. The Court noted, for example, that the networks state that the 40 percent limitation on the amount of prime-time entertainment they can supply from in-house production is a new restriction, having no counterpart in the original rules.[5] *Schurz* at 13.

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[1] *See Schurz Communications, Inc., et al., v. Federal Communications Commission and the United States of America*, Nos. 91-2350, *et al.*, slip opinion (7th Cir., November 5, 1992), and *modified*, (December 7, 1992).

[2] *Report and Order* in MM Docket No. 90-162, 6 FCC Rcd 3094 (1991). Recon. granted in part/denied in part, 7 FCC Rcd 345 (1991).

[3] The Commission had expressly advised the Court that it had no independent intention to and, in fact, had not repealed the 1970 rules in its *Order, Public Notice*, FCC 92-520 (released November 20, 1992) (Chairman Sikes and Commissioner Quello dissenting and issuing statements).

[4] *See* 47 CFR §§73.658(k), 73.659-73.662, 73.3526(a)(11) (1991).

[5] We note that neither the 1970 rules nor the 1983 *Tentative*

7. Further, the Court opined that the 1991 rules appear to harm rather than to help outside producers as a whole, especially the smallest and least able to bear risk, by reducing their bargaining options. The Court also stated that the Commission's decision did not fully explain how the 1991 rules prevent networks from extracting financial interests or syndication rights from outside producers. In particular, it questioned whether the new safeguards (*e.g.*, the 30-day phased negotiations) could provide meaningful protection against extraction. *Schurz* at 16.

8. The Court also stated that the Commission failed to respond to the argument that its rules limit competition with the established networks, thereby limiting rather than promoting diversity. Specifically, the Court noted that the 1991 rules limit Fox Broadcasting Company to supplying no more than 15 hours of programming to its affiliates if Fox is to remain exempt from the 1991 rules. Thus, the Court found these rules to weaken Fox's incentives to furnish prime-time programming to its affiliates, many of whom are traditionally weak UHF stations, which appeared contrary to the Commission's desire to strengthen such stations. *Schurz* at 17-18.

9. The Court also found that the Commission's *Order* did not adequately address the 1983 *Tentative Decision and Request for Further Comments* in Docket 82-345,[6] and its legal significance as a Commission precedent. The Court said that the Commission should have better explained the differences between the 1983 *Tentative Decision* and the 1991 *Order*. Finally, the Court said that while the Commission's *Order* states that a primary purpose of the 1991 rules is to promote "diversity", the Commission did not define the term nor adequately explain how the 1991 rules promote diversity. *Schurz* at 19. Accordingly, we seek specific comment on whether and how the 1991 rules are likely to preserve or enhance diversity of prime time broadcast television programming services and outlets.

10. The Court conceded that the arguments raised by the Justice Department, the networks and others with respect to the effect of the rules on competition, risk-sharing and diversity may be speculative, theoretical or wrong. These arguments were, however, sufficiently persuasive, in the Court's opinion, to have placed a burden of explanation that the Commission did not meet. In remanding the matter to the Commission, the Court suggested that we could seek to "rejustify" the 1991 rules or, in the alternative, draft new rules. The Court imposed a deadline of 120 days. The Court noted that the Commission may ask the Court for a stay, but, failing that, all Commission financial interest and syndication rules would be eliminated after 120 days. In compliance with the Court's mandate, we intend to reexamine the extensive record already compiled with a view toward reconciling new or revised rules, if any, with the Court's concerns. Commenters are invited to submit new information in support of the 1991 rules or, in the alternative, to propose a revised set of financial interest and syndication rules. Comments should not merely reiterate parties' positions already on the record, but should instead respond specifically and directly to the Court's opinion and the appropriate Commission response. In addition, we will consider the impact of regulatory changes and marketplace developments that have occurred during the intervening period. For example, commenters may want to assess the impact of the Commission's modified network-cable rules,[7] or the program access and industry structural review initiatives required by the 1992 Cable Act.[8] In this regard, commenters are invited to assess the need for a revised review period or the adoption of a presumption of sunset of any future rules in light of the Court's remand. We particularly encourage parties to consolidate their pleadings whenever possible.

IV. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

11. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Second Further Notice of Proposed Rulemaking*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Second Further Notice of Proposed Rulemaking*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

B. Ex Parte

12. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. Sections 1.1202, 1.203, and 1.206(a).

C. Comment Procedures

13. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **February 1, 1993,** and reply comments on or before **February 16, 1993.** To file formally in this proceeding, you must file an original plus five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

Decision and Request for Further Comments permitted network domestic syndication of any programming. The 1991 rules relaxed the prior syndication prohibition, but invoked a scheduling safeguard as an interim measure.

[6] 94 FCC 2d at 1063.

[7] *See Report and Order* in MM Docket No. 82-434, 7 FCC Rcd 6156 (1992), *reconsideration pending*.

[8] *See*, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. (1992).

14. The Commission must reach a decision in an expeditious manner, in light of the 120-day deadline imposed by the Court. Thus, comments on the issues raised in this *Second Further Notice of Proposed Rulemaking* shall not exceed thirty double-spaced typed pages, and reply comments shall not exceed twenty double-spaced typed pages.

D. Ordering Clauses

15. Authority for this proposed *Second Further Notice of Proposed Rulemaking* is contained in Sections 4(i) and (j), and 301, 303(i), 303(r), 313 and 314 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(i), 303(r), 313 and 314.

16. For further information on this proceeding, contact Judith Herman, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. *Reason for action.* This *Second Further Notice of Proposed Rulemaking* is initiated to obtain comment regarding the appropriate action the Commission should take in response to the Court's remand of the Commission's decision in the *Order* in this proceeding.

II. *Objectives.* The Commission seeks to review and perhaps modify its 1991 financial interest and syndication rules in light of the Court's decision.

III. *Legal basis.* Action as proposed for this rulemaking is contained in Sections 4(i), 4(j), 301, 303(i), 303(r), 313 and 314 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(i), 303(r), 313 and 314.

IV. *Reporting, recordkeeping and other compliance requirements.* None.

V. *Federal rules which overlap, duplicate or conflict with this rule.* None.

VI. *Description, potential impact and number of small entities affected.* Any rule changes in this proceeding could affect television program producers, television networks and their affiliate stations, non-network television stations, cable networks, cable television program producers, cable television networks and cable television operators. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

VII. *Any significant alternatives minimizing impact on small entities and consistent with stated objective.* None.

STATEMENT OF FCC CHAIRMAN ALFRED C. SIKES

Regarding the Reassessment of the "Financial Interest and Syndication" Rule

I continue strongly to believe that the Government should not be involved in commercial battles between television networks and the producer community in general -- especially the big multinational entertainment companies.

I can hypothesize, however, sound public policy reasons why some limited Government role might be warranted if it were clearly shown there is no other means of fostering more genuine program diversity. Consequently, commenters should address -- and debate should surround -- the question whether the networks, if they were accorded free rein, would be more or less hospitable to prospective or nascent producers, especially those with new programming ideas. If networks are likely to be less hospitable, commenters should then recommend reasonable steps this agency might take to ensure an environment that is more conducive to allowing prospective or nascent producers to make a contribution.

It may well be that there is no good reason to assume any Government rules would be publicly beneficial -- or, more accurately, work markedly better than a marketplace solution. Markets need not work better than regulation to be desirable; all markets need do is work as effectively as regulation and, as anyone exposed to the regulatory process appreciates, it is not hard to work "as effectively" as regulation. We should, however, endeavor to explore fully this one question of how best to foster a program production environment conducive to a diversity greater than we enjoy today. Comments on this point, accordingly, would be welcome.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-266

In the Matter of

Implementation of the Cable
Television Consumer Protection
and Competition Act of 1992

Rate Regulation

ORDER

Adopted: December 10, 1992; Released: December 23, 1992

Response Date: January 22, 1993

By the Commission:

1. The Commission has adopted a Notice of Proposed Rulemaking ("NPRM")[1] that proposes and discusses alternative procedural and substantive regulations to implement the requirements of Sections 623, 612, and 622(c) of the Communications Act of 1934, as amended[2] by the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992").[3] These statutory provisions direct the Commission to adopt rules to govern rates for cable service and for leased commercial access.

2. Section 623 as amended by the Cable Act of 1992 requires the Commission to establish rules to govern rate regulation of cable services offered by cable systems not subject to effective competition. The statute requires the Commission in establishing such regulations to consider the rates for cable systems that are subject to effective competition.[4] Section 623 additionally requires the Commission to consider other factors in fashioning regulations governing rates for cable service.[5] We must also seek to reduce administrative burdens on cable systems, franchising authorities, consumers, and the Commission.[6] As discussed in the NPRM, benchmark regulatory alternatives based on industry data may permit an effective implementation of the statute that significantly reduces overall administrative burdens.

3. In order to assure that we may adequately consider the rates of systems subject to effective competition, as required by the Cable Act of 1992, and in order to permit the Commission and interested parties to fully consider benchmark regulatory alternatives, we have determined to collect data from a sample of cable systems. The sample of systems from whom we will collect data includes a group consisting of cable systems identified as likely to be operating in competitive markets, a random sample of cable system community units, and a group of large systems added to compensate for the small number of large systems likely to appear in a random sample. The sample will consist of approximately 850 community units. The data we will collect from these systems will provide representative rate and other information that could be useful in establishing benchmarks, if the Commission elects to adopt that regulatory alternative.[7]

4. This collection of information is mandatory.[8] The systems we have identified in our sampling of community units must complete and return the questionnaire set forth in the attached Appendix by January 22, 1993.[9] In order to facilitate the completion of this questionnaire by the respondent cable systems, we have prepared a cover letter and instructions. These materials are also included in the attached Appendix. The cover letter, instructions, and questionnaire will be sent to the respondent cable systems by certified mail.

5. We do not anticipate that the information specified in the Appendix will be competitively sensitive. If a respondent believes that this information should not be released to the public, it should submit its responses pursuant to Section 0.459 of the Commission's rules.[10]

6. Respondents shall file an original and three copies of the questionnaire with the Cable Television Branch, Attn: Rate Questionnaire, Federal Communications Commission, Room 244, Washington, D.C. 20554.

7. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), and 403, of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), and 403, That cable systems subject to this data collection shall complete and return the questionnaire set forth in the attached Appendix by January 22, 1993.

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[1] Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation (Notice of Proposed Rulemaking)("NPRM"), MM Docket No. 92-266, FCC 92-544, adopted December 10, 1992.

[2] 47 U.S.C. Sections 543, 532, and 542(c).

[3] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, §§ 3,9,14, 106 Stat. 1460 (1992).

[4] Communications Act Section 623(b)(2), 47 U.S.C. Section 543(b)(2).

[5] *Id.*

[6] Communications Act, Section 623(b)(2)(A), 47 U.S.C. Section 543(b)(2)(A).

[7] We have not requested data on system costs because of lack of uniform accounting categories by cable systems and the unavailability of disagreggated system specific data within the time constraints imposed by the Cable Act of 1992. To the extent parties support a cost-of-service benchmark, however, they should provide specific and detailed cost data in response to the NPRM.

[8] The Office of Management and Budget approved this collection of data under the Paperwork Reduction Act of 1980 on December 21, 1992, OMB Control No. 3060-0529. Approval for this collection of information will expire on March 15, 1993.

[9] We have associated with the public file in MM Docket 92-266 a list of the 850 systems subject to this data collection. This list is available for inspection and copying in Room 239, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554 9:00 AM - 5:30 PM, Monday - Friday. Copies may also be obtained from the Commission's contractor for public records duplication, Downtown Copy Center, Suite 640, 1990 M Street, N.W., Washington, D.C. 20036, (202) 452-1422.

[10] 47 C.F.R. Section 0.459.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 23, 1992

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Approved by OMB
3060-0529
Expires March 15, 1993
Estimated average burden
hours per response: 20 hrs.

To the cable system operator:

In order to implement the Cable Television Consumer Protection and Competition Act of 1992, the Federal Communications Commission is collecting information from certain cable systems concerning the rates they charge, competition in their franchise areas, and other system characteristics. The information is needed in order for the Commission to devise procedures for determining whether rates are reasonable or unreasonable. The information provided will be used for determining overall conditions in the industry, and not to identify individual systems for enforcement purposes.

As described in a Commission *Order*, FCC 92-545, you are required, pursuant to 47 U.S.C. Section 403, to fill out and return the attached questionnaire. Failure to respond to the questionnaire or misrepresentation of information may result in enforcement action under 47 U.S.C. Section 503. Careful and complete responses are extremely important for enabling the Commission to devise sensible rate policies.

Though the questionnaire is being mailed to the community unit, it should be forwarded to the *system* manager to be completed. A signed original and three copies should be returned by January 22, 1993, to the following address:

Cable Television Branch
Federal Communications Commission
Room 244
Washington, DC 20554
Attn: Rate Questionnaire

The public reporting burden for this collection of information is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed and completing and reviewing the collection of information. Comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to the Federal Communications Commission, Records Management Division, Room 416, Paperwork Reduction Project (3060-0529), Washington, DC 20554, and to the Office of Management and Budget, Paperwork Reduction Project (3060-0529), Washington, DC 20503.

[ ]

[ ]

Cable Television Branch
Room 244
Federal Communications Commission
Washington DC 20554
Attn: Rate Questionnaire

CABLE TV SYSTEM OPERATORS RATE STRUCTURE QUESTIONNAIRE ISSUED PURSUANT TO FCC ORDER 92-545

This questionnaire is intended to provide the FCC with information regarding rates and other characteristics of the cable industry. The data will be used to assess general cable industry rate relationships. Your response is mandatory.

Legal Name of Cable System: _____

Doing Business As: _____

I certify that I have examined the attached report, that to the best of my knowledge, information and belief, all statements of fact contained in this report are true and that said report is an accurate statement of the affairs of the above named respondent in respect of the data set forth herein:

_____ Signature of respondent

_____ Title of respondent

____/____/____ Date signed

THIS COVER PAGE MUST BE SIGNED AND RETURNED WITH THE ORIGINAL AND 3 COPIES OF THE FULL QUESTIONNAIRE BY FRIDAY JANUARY 22, 1993 TO:

Cable Television Branch
Room 244, FCC
Washington DC, 20554
Attn: Rate Questionnaire

HOW TO COMPLETE THIS QUESTIONNAIRE

The franchise area to which this questionnaire is addressed has been selected by random or other means to form part of a representative sample of the cable industry. The questionnaire seeks rate and other information for:

(i) this franchise area;
(ii) the whole cable system to which it belongs; and
(iii) one other franchise area in the same cable system.

You should read the attached instructions before completing this questionnaire. Provide the best information currently available. If the requested information is not precisely known provide your best estimate. For further assistance in completing this questionnaire, contact:

Ms. Florence Setzer at (202) 653-5940 or
Ms. Jane Frenette at (202) 634-1861.

There are 13 schedules in this questionnaire:

SCHEDULE 1	CABLE SYSTEM INFORMATION
SCHEDULE 2	CABLE SYSTEM CHARACTERISTICS
SCHEDULE 3	CABLE SYSTEM ANNUAL REVENUE
SCHEDULE 4	COMPETITION IN FRANCHISE AREAS
SCHEDULE 5	FIRST FRANCHISE AREA: CHARACTERISTICS
SCHEDULE 6	FIRST FRANCHISE AREA: FRANCHISE FEES AND CHARGES
SCHEDULE 7	FIRST FRANCHISE AREA: 1992 CHANNELS AND CHARGES
SCHEDULE 8	FIRST FRANCHISE AREA: 1986 CHANNELS AND CHARGES
SCHEDULE 9	SECOND FRANCHISE AREA SERVED BY SYSTEM
SCHEDULE 10	SECOND FRANCHISE AREA: CHARACTERISTICS
SCHEDULE 11	SECOND FRANCHISE AREA: FRANCHISE FEES AND CHARGES
SCHEDULE 12	SECOND FRANCHISE AREA: 1992 CHANNELS AND CHARGES
SCHEDULE 13	SECOND FRANCHISE AREA: 1986 CHANNELS AND CHARGES

Schedules 1 through 4 must be completed for the whole cable system including the franchise area to which the questionnaire has been addressed and all other franchise areas in the system.

Schedules 5 through 8 must be completed for the franchise area to which this questionnaire is addressed. This franchise area is referred to in the questionnaire as "the first franchise area".

Schedule 9 must be completed to select a second franchise area in the system. Where prices and channels are the same for all franchise areas in the system, Schedules 10 and 11 must be completed for this second franchise area. Where prices or channels differ among franchise areas in the system, all of Schedules 10 through 13 must be completed for this second franchise area. (If the system has only one franchise area you do not need to complete Schedules 9 through 13.)

FCC USE Identifier: |M|M|B| | | | | | | |0|1|

SCHEDULE 1 **CABLE SYSTEM INFORMATION**

Line	Item:	
1	Legal name of cable system	
2	System is "Doing Business As"	
3	City or town, county and state in which system is located	

List all communities served by this system, zip code of community, Community Unit ID Number and the name of each community's Franchise Authority

	Community	Zip Code	Community Unit ID No	Franchise Authority
4				
5				
6				
7				
8				
9				
10				
11				
12				

13	Name of cable system owner	
14	City or town and state location of cable system owner	
15	Name of cable system contact officer responsible for completing this form	
16	Phone number of cable system contact officer	
17	Name of franchise authority contact officer*	
18	Phone number of franchise* authority contact officer	

* Provide a contact officer name and phone number for the franchise authority for the franchise area to which this questionnaire is addressed.

FCC USE Identifier: |M|M|B| | | | | | | |0|2|

SCHEDULE 2 **CABLE SYSTEM CHARACTERISTICS**

All information provided should be as of September 30, 1992.

Line	Item:	
1	Number of households in the system area	
2	Number of households passed	
3	Number of households subscribing	
4	Number of addressable subscribers	
5	What is the main type of addressability? (e.g., one-way, two-way, impulse)	
6	Number of headends serving the system	
7	Age of principal headend	years
8	Total line miles of distribution plant in the system	miles
	Percentage of line miles of distribution plant which is:	
9	- above ground:	%
10	- below ground:	%
11	- fiber:	%
12	Is the system required to bury all cable drops? (Circle one.)	**Yes** **No**
13	Is the system part of a Multiple System Operator (MSO) of 2 or more systems? (Circle one.)	**Yes** **No**
14	If you responded **"Yes"** on line 13, how many systems are in the MSO?	

FCC USE Identifier: |M|M|B| | | | | | |0|3|

SCHEDULE 3 **CABLE SYSTEM ANNUAL REVENUE**

All information should be for the latest complete fiscal year.

Line	Item:	
1	Fiscal year ending date: Month | | | Day | | | Year| | |	
	Revenue from:	**AMOUNT (omit cents)**
2	- subscriptions to your basic tier	$| | | | | | | | | |
3	- other tier subscriptions	$| | | | | | | | | |
4	- pay channel subscriptions	$| | | | | | | | | |
5	- pay-per-view charges	$| | | | | | | | | |
6	- advertising on basic tier	$| | | | | | | | | |
7	- advertising on other tiers	$| | | | | | | | | |
8	- advertising on pay and pay-per-view	$| | | | | | | | | |
9	- installation charges	$| | | | | | | | | |
10	- equipment rental	$| | | | | | | | | |
11	- additional outlet charges	$| | | | | | | | | |
12	- other revenue	$| | | | | | | | | |
13	Total revenue	$| | | | | | | | | |
	If you show an amount on line 12 for other revenue, indicate the type(s) of revenue:	
14		
	What is the value of any non-revenue benefits, such as promotional advertising, received by the system for providing cable services during the fiscal year?	
15		$| | | | | | | | | |
	Specify the type(s) of non-revenue benefits received:	
16		

FCC USE Identifier: |M|M|B| | | | | | | |0|4|A|

SCHEDULE 4 **COMPETITION IN FRANCHISE AREAS**

Line	Item:		
1	Do fewer than 30 percent of the households in any franchise area served by the system subscribe to any cable services (of this or any cable system)? (Circle one.)	**Yes**	**No**

If you answered **"Yes"** on line 1, list the franchise areas with less than 30 percent of households subscribing to this or any cable service and the estimated percentage of households subscribing to any cable service in these franchise areas:

Line	**Franchise areas with less than 30% of households subscribing to this or any cable service**	**Estimated % of households subscribing to this or any cable service.**
2		

Line	Item:		
3	Does any competitor* offer similar service to at least 50 percent of households in any franchise area served by this system? (Circle one.)	**Yes**	**No**

* For the purposes of Schedule 4, a competitor could include:

- another unaffiliated cable operator;
- a multi-channel multi-point distribution service (MMDS);
- a direct broadcast satellite (DBS) service;
- a television receive-only (TVRO) satellite program distributor; or
- a satellite master antenna television (SMATV) system.

However, a competitor must offer a similar service by making available for purchase by subscribers or customers multiple channels of video programming.

FCC USE Identifier: |M|M|B| | | | | | | |0|4|B|

SCHEDULE 4 CONTINUED **COMPETITION IN FRANCHISE AREAS**

Line	Item:		
	If you answered "Yes" on line 3, list the franchise areas which have competitors which offer similar services to at least 50% of households, the name of all such competitors in each franchise area and your estimate of the percentage of households in each franchise area to which each competitor offers similar services.		
	Name of franchise area in which a competitor offers similar service to at least 50% of households	**Name of all such competitors in each franchise area**	**Percentage of of households to which such competitors offer service**
4			
5	Does a franchising authority offer video programming service to at least 50 percent of households in any franchise area served by this system? (Circle one.) **Yes** **No**		
	If you answered "Yes" on line 5, list the franchise areas in which franchise authorities offer video programming services to at least 50% of households, the name of the franchise authority and your estimate of the percentage of households in the franchise area to which they offer services.		
	Name of franchise area in which franchise authority offers video programming	**Name of franchise authority**	**Percentage of households**
6			

FCC USE Identifier: |M|M|B| | | | | | | |0|5|

SCHEDULE 5 **FIRST FRANCHISE AREA: CHARACTERISTICS**

The first franchise area is the one to which this questionnaire is addressed. **All information provided should be as of September 30, 1992.**

Line	Item:	
1	Name of franchise area	
2	Community Unit ID No. of this franchise area	| | | | | | | |
3	Number of households in this franchise area	| | | | | | | | |
4	Number of households in this franchise area which are passed by system distribution plant	| | | | | | | | |
5	Number of households in this franchise area which subscribe to this system	| | | | | | | | |
6	Number of addressable subscribers in this franchise area	| | | | | | | | |
7	What is the main type of addressability? (e.g., one-way, two-way, impulse)	
8	Number of headends serving franchise area	| | |
9	Age of principal headend	| | | years
10	Line miles of distribution plant in this franchise area	| | | | | | miles
	Percentage of line miles of distribution plant in line 10 which is:	
11	- above ground:	| | | | %
12	- below ground:	| | | | %
13	- fiber:	| | | | %
14	Is the franchise required to bury all cable drops? (Circle one.)	**Yes** **No**

FCC USE Identifier: |M|M|B| | | | | | |0|6|

SCHEDULE 6 **FIRST FRANCHISE AREA: FRANCHISE AUTHORITY FEES AND CHARGES**

All information provided should be for the latest fiscal year.

Line	Item:
	What is the total of franchise fees paid in the last completed fiscal year for this franchise area?
1	$\| \| \| \| \| \| \| \| \| \|$
	Show how this payment is calculated and incurred. Show either the amount per subscriber or the percentage of basic or total subscriber revenue, as appropriate:
2	|$| | | . | |per subscriber per year|
3	or | | . | |% of basic subscriber revenue|
4	or | | . | |% of total subscriber revenue|
	Does the franchise fee appear as a separate line item on on the subscriber's monthly bill? (Circle one.)
5	| Yes | No |
	Apart from those in lines 2, 3 or 4, specify any other fees, taxes or charges by the franchise authority paid for this franchise (e.g., fixed amounts, equipment-related charges). Specify the amount, how the total payment is calculated and the frequency of payment. **Include only fees, taxes and charges specific to the cable industry. Do not include general fees, taxes or charges such as sales tax or corporate income tax.**
6	
	Which, if any, of the fees, taxes or charges shown on line 6 appear as separate line items on the subscriber's monthly bill?
7	

FCC USE Identifier: |M|M|B| | | | | | | |0|7|A|

SCHEDULE 7 **FIRST FRANCHISE AREA: 1992 TIERS, CHANNELS AND CHARGES**

Provide the information required for each of:
- o equipment and supplementary charges;
- o the basic tier as provided in the franchise area;
- o each of the two other tiers which have the most subscribers; and
- o all channels in the franchise.

All charges, channels and subscriber information provided should be as of September 30, 1992.

Line	Item:	
	EQUIPMENT AND SUPPLEMENTARY CHARGES	
	Average charges:	
1	- installation fee	$| | . | |
2	- disconnect fee	$| | . | |
3	- reconnect fee	$| | . | |
4	- monthly converter box rental	$| | . | |
5	- monthly remote control rental	$| | . | |
6	- monthly additional outlet fee	$| | . | |
7	- tier changing fee	$| | . | |
	List any other equipment and supplementary charges which are not included in lines 1 through 7. (Show amount and type of charge.)	
8		
	For the last completed fiscal year give the number of:	
9	- installations provided	| | | | | | |
10	- disconnections	| | | | | | |
11	- reconnections	| | | | | | |
	For the last fiscal year, give the average number of:	
12	- converter boxes rented	| | | | | | |
13	- remote control units rented	| | | | | | |
14	- additional outlets charged for	| | | | | | |
15	- tier changes charged for	| | | | | | |
	If you listed any additional charges on line 8, list the average volumes for each item in the last fiscal year:	
16		

FCC USE Identifier: |M|M|B| | | | | | | |0|7|B|

SCHEDULE 7 CONTINUED **FIRST FRANCHISE AREA: 1992 TIERS, CHANNELS AND CHARGES**

Line	Item:	
	BASIC TIER	
17	Subscribers to the basic tier	| | | | | | | | |
	Number of:	
18	- local TV broadcast stations	| | |
19	- distant TV broadcast stations	| | |
20	- satellite-delivered cable network channels	| | |
21	- public educational government access channels	| | |
22	- other channels in the basic tier	| | |
23	Total number of channels in the basic tier	| | |
24	Monthly subscription charge	$| | . | |
	What other charges are incurred for the basic service tier? (Show amount and type of charge.)	
25		
	SECOND TIER	
26	Subscribers to this tier	| | | | | | | | |
	Number of:	
27	- local TV broadcast stations	| | |
28	- distant TV broadcast stations	| | |
29	- satellite-delivered cable network channels	| | |
30	- public educational government access channels	| | |
31	- other channels in this tier	| | |
32	Total number of channels in this tier	| | |
33	Monthly subscription charge for this tier only	$| | . | |
	What other charges are incurred for the second tier? (Show amount and type of charge.)	
34		

FCC USE Identifier: |M|M|B| | | | | | | |0|7|C|

SCHEDULE 7 CONTINUED **FIRST FRANCHISE AREA: 1992 TIERS, CHANNELS AND CHARGES**

	THIRD TIER	
35	Subscribers to this tier	
	Number of:	
36	- local TV broadcast stations	
37	- distant TV broadcast stations	
38	- satellite-delivered cable network channels	
39	- public educational government access channels	
40	- other channels in this tier	
41	Total number of channels in this tier	
42	Monthly subscription charge for this tier only $.	
	What other charges are incurred for the third tier? (Show amount and type of charge.)	
43		

	ALL CHANNELS IN THIS FRANCHISE AREA	
44	Total channels in basic tier (as in line 23)	
45	Total channels in second tier (as in line 32)	
46	Total channels in third tier (as in line 41)	
47	Total channels in any other tiers	
48	Total pay channels	
49	Total pay-per-view channels	
50	Any other channels in this franchise area	
51	Total of all channels in this franchise area	

FCC USE	Identifier: |M|M|B| | | | | | | |0|8|A|

SCHEDULE 8 **FIRST FRANCHISE AREA: 1986 TIERS, CHANNELS AND CHARGES**

Line	Item:		
A.1	Did the system provide programming services in this franchise area in November 1986? (Circle one.)	**Yes**	**No**

If you answered **"Yes"** on line A.1, you must complete the rest of Schedule 8 to the best of your ability.

If you answered **"No"** on line A.1, skip the rest of Schedule 8 and go to Schedule 9.

A.2	As of November 30, 1986, was the franchise area rate regulated? (Circle one.)	**Yes**	**No**

Provide the information required on the next three pages for:

- equipment and supplementary charges;
- the basic tier as provided in this franchise area;
- each of the two other tiers which had the most subscribers; and
- all channels in the franchise.

All charges and subscriber information provided in this Schedule should be as of November 30, 1986.

FCC USE Identifier: |M|M|B| | | | | | | |0|8|B|

SCHEDULE 8 CONTINUED — FIRST FRANCHISE AREA: 1986 TIERS, CHANNELS AND CHARGES

Line	Item:	
	EQUIPMENT AND SUPPLEMENTARY CHARGES	
	Average charges as of November 30, 1986:	
1	- installation fee	$| | . | |
2	- disconnect fee	$| | . | |
3	- reconnect fee	$| | . | |
4	- monthly converter box rental	$| | . | |
5	- monthly remote control rental	$| | . | |
6	- monthly additional outlet fee	$| | . | |
7	- tier changing fee	$| | . | |
	List any other equipment and supplementary charges which are not included in lines 1 through 7. (Show amount and type of charge.)	
8		
	For the fiscal year which included November 30, 1986, give the number of:	
9	- installations provided	| | | | | | |
10	- disconnections	| | | | | | |
11	- reconnections	| | | | | | |
	For the same fiscal year, give the average number of:	
12	- converter boxes rented	| | | | | | |
13	- remote control units rented	| | | | | | |
14	- additional outlets charged for	| | | | | | |
15	- tier changes charged for	| | | | | | |
	If you listed any additional charges on line 8, list the average volumes for each item in the same fiscal year:	
16		

FCC USE Identifier: |M|M|B| | | | | | | |0|8|C|

SCHEDULE 8 CONTINUED **FIRST FRANCHISE AREA: 1986 TIERS, CHANNELS AND CHARGES**

Line	Item:	
	BASIC TIER As of November 30, 1986, give the number of:	
17	Subscribers to the basic tier	| | | | | | | | |
18	- local TV broadcast stations	| | |
19	- distant TV broadcast stations	| | |
20	- satellite-delivered cable network channels	| | |
21	- public educational government access channels	| | |
22	- other channels in the basic tier	| | |
23	Total number of channels in the basic tier	| | |
24	Monthly subscription charge	$| | . | |
	What other charges were incurred for the basic service tier? (Show amount and type of charge.)	
25		
	SECOND TIER As of November 30, 1986, give the number of:	
26	Subscribers to the second tier	| | | | | | | | |
27	- local TV broadcast stations	| | |
28	- distant TV broadcast stations	| | |
29	- satellite-delivered cable network channels	| | |
30	- public educational government access channels	| | |
31	- other channels in this tier	| | |
32	Total number of channels in this tier	| | |
33	Monthly subscription charge for this tier only	$| | . | |
	What other charges were incurred for the second tier? (Show amount and type of charge.)	
34		

FCC USE Identifier: |M|M|B| | | | | | | |0|8|D|

SCHEDULE 8 CONTINUED **FIRST FRANCHISE AREA: 1986 TIERS, CHANNELS AND CHARGES**

THIRD TIER
As of November 30, 1986, give the number of:

35	Subscribers to the third tier	
	Number of:	
36	- local TV broadcast stations	
37	- distant TV broadcast stations	
38	- satellite-delivered cable network channels	
39	- public educational government access channels	
40	- other channels in this tier	
41	Total number of channels in this tier	
42	Monthly subscription charge for this tier only $.	

What other charges are incurred for the third tier? (Show amount and type of charge.)

43

ALL CHANNELS IN THIS FRANCHISE AREA
As of November 30, 1986, give the number of:

44	Total channels in basic tier (as in line 23)	
45	Total channels in second tier (as in line 32)	
46	Total channels in third tier (as in line 41)	
47	Total channels in any other tiers	
48	Total pay channels	
49	Total pay-per-view channels	
50	Any other channels in this franchise area	
51	Total of all channels in this franchise area	

FCC USE Identifier: |M|M|B| | | | | | | |0|9|A|

SCHEDULE 9 **SECOND FRANCHISE AREA SERVED BY SYSTEM**

This schedule is intended to provide information on differences in services and charges among franchise areas served by the system. Your answers to the questions in this schedule will determine which franchise area - the second franchise area - should provide the information in Schedules 10 through 13.

The second franchise area should be the franchise area other than the one reported in Schedules 5 through 8 with the most subscribers and which has competition, as determined by completing Schedule 4. If there are no franchise areas with competition, the second franchise area should be the remaining franchise area with the most subscribers. In addition, however, if prices and channel lineups differ among franchise areas, the second franchise area should also be one that has different prices and channel lineups from the first franchise area used in Schedules 5 through 8. Answer the questions in this schedule to choose the correct second franchise area.

All information provided should be as of September 30, 1992.

(If the system has only one franchise area - as listed in Schedule 1 - you do not need to complete Schedules 9 through 13.)

Line	Item:	
1	Do all franchise areas served by this system have the same prices? (Circle one.)	**Yes** / **No**
2	If you answered "**No**" on line 1, how many different price structures are there in the system?	
3	Do all franchise areas served by this system have the same channel lineup? (Circle one.)	**Yes** / **No**
4	If you answered "**No**" on line 3, how many different channel lineups are there in the system?	

If you answered **"Yes"** on both lines 1 and 3, that is if all franchise areas in the system have the same prices and channel lineup, go to line 5 on the next page.

If you answered **"No"** on either, or both, of lines 1 and 3, skip lines 5 through 7 and go to line 8 on page 19.

FCC USE Identifier: |M|M|B| | | | | | | |0|9|B|

SCHEDULE 9 CONTINUED FRANCHISE AREAS SERVED BY SYSTEM

If all franchise areas have the same prices and channels, complete line 5.

5	Refer to Schedule 4: Did you list any franchise areas on lines 2, 4 or 6 of Schedule 4, other than the franchise area to which the questionnaire was addressed? (Circle one.)	**Yes**	Go to line 6.
		No	Skip line 6, go to line 7.
6	If you answered "**Yes**" on line 5, which of the franchise areas listed in Schedule 4 has the most subscribers (not including the franchise area to which the questionnaire was addressed)?		
7	If you answered "**No**" on line 5, refer to Schedule 1: Which of the franchise areas in Schedule 1 has the most subscribers (not including the franchise area to which the questionnaire was addressed)?		

You should complete Schedules 10 and 11 for the franchise area identified on line 6 or 7.

You do not need to complete Schedules 12 or 13 if all franchise areas in the system have the same prices and channels.

FCC USE Identifier: |M|M|B| | | | | | |0|9|C|

SCHEDULE 9 CONTINUED **FRANCHISE AREAS SERVED BY SYSTEM**

If some or all franchise areas have different prices or channels, complete line 8.

8	Refer to Schedule 4: Did you list any franchise areas on lines 2, 4 or 6 of Schedule 4, other than the franchise area to which the questionnaire was addressed? (Circle one.)	Yes	Complete lines 9 to 11.
		No	Skip lines 9 to 11, complete line 12.
9	If you answered "Yes" on line 8, of the franchise areas listed in Schedule 4, how many different price structures are there?		
10	Of the franchise areas listed in Schedule 4, how many different channel lineups are there?		
11	Of the franchise areas listed in Schedule 4, which one has: - the most subscribers (not including the franchise area to which the questionnaire was addressed), and - different prices or channel lineup from the franchise area to which the questionnaire was addressed?		
12	If you answered "No" on line 8, refer to Schedule 1. Of all the franchise areas listed on lines 4 through 12 of Schedule 1, which one has: - the most subscribers (not including the franchise area to which the questionnaire was addressed), and - different prices or channel lineup from the franchise area to which the questionnaire was addressed?		

You should complete Schedules 10 through 13 for the franchise area identified on line 11 or 12.

FCC USE Identifier: |M|M|B| | | | | | | |1|0|

SCHEDULE 10 **SECOND FRANCHISE AREA: CHARACTERISTICS**

The second franchise area is the one identified on line 6, 7, 11 or 12 of Schedule 9. **All information provided should be as of September 30, 1992.**

Line	Item:	
1	Name of second franchise area	
2	Community Unit ID No. of this franchise area	| | | | | | | |
3	Number of households in this franchise area	| | | | | | | | |
4	Number of households in this franchise area which are passed by system distribution plant	| | | | | | | | |
5	Number of households in this franchise area which subscribe to this system	| | | | | | | | |
6	Number of addressable subscribers in this franchise area	| | | | | | | | |
7	What is the main type of addressability? (e.g., one-way, two-way, impulse)	
8	Number of headends serving franchise area	| | |
9	Age of principal headend	| | |years|
10	Line miles of distribution plant in this franchise area	| | | | | | |miles|
	Percentage of line miles of distribution plant in line 10 which is:	
11	- above ground:	| | | |%|
12	- below ground:	| | | |%|
13	- fiber:	| | | |%|
14	Is the franchise required to bury all cable drops? (Circle one.)	**Yes** | **No**

FCC USE Identifier: |M|M|B| | | | | | | |1|1|

SCHEDULE 11 **SECOND FRANCHISE AREA: FRANCHISE AUTHORITY FEES AND CHARGES**

All information provided should be for the latest fiscal year.

Line	Item:	
	What is the total of franchise fees paid in the last completed fiscal year for this franchise area?	
1	$	| | | | | | | | |
	Show how this payment is calculated and incurred. Show either the amount per subscriber or the percentage of basic or total subscriber revenue, as appropriate:	
2	|$| | | . |	per subscriber per year
3	or | | . |	% of basic subscriber revenue
4	or | | . |	% of total subscriber revenue
	Does the franchise fee appear as a separate line item on on the subscriber's monthly bill? (Circle one.)	
5		Yes | No
	Apart from those in lines 2, 3 or 4, specify any other fees, taxes or charges by the franchise authority paid for this franchise (e.g., fixed amounts, equipment-related charges). Specify the amount, how the total payment is calculated and the frequency of payment. **Include only fees, taxes and charges specific to the cable industry. Do not include general fees, taxes or charges such as sales tax or corporate income tax.**	
6		
	Which, if any, of the fees, taxes or charges shown on line 6 appear as separate line items on the subscriber's monthly bill?	
7		

FCC USE Identifier: |M|M|B| | | | | | | |1|2|A|

SCHEDULE 12 **SECOND FRANCHISE AREA: 1992 TIERS, CHANNELS AND CHARGES**

Provide the information required for each of:
- o equipment and supplementary charges;
- o the basic tier as provided in the franchise area;
- o each of the two other tiers which have the most subscribers; and
- o all channels in the franchise.

All charges and subscriber information provided should be as of September 30, 1992.

Line	Item:	
	EQUIPMENT AND SUPPLEMENTARY CHARGES	
	Average charges:	
1	- installation fee	$| | | . | |
2	- disconnect fee	$| | | . | |
3	- reconnect fee	$| | | . | |
4	- monthly converter box rental	$| | | . | |
5	- monthly remote control rental	$| | | . | |
6	- monthly additional outlet fee	$| | | . | |
7	- tier changing fee	$| | | . | |
	List any other equipment and supplementary charges which are not included in lines 1 through 7. (Show amount and type of charge.)	
8		
	For the last completed fiscal year give the number of:	
9	- installations provided	| | | | | | |
10	- disconnections	| | | | | | |
11	- reconnections	| | | | | | |
	For the last fiscal year, give the average number of:	
12	- converter boxes rented	| | | | | | |
13	- remote control units rented	| | | | | | |
14	- additional outlets charged for	| | | | | | |
15	- tier changes charged for	| | | | | | |
	If you listed any additional charges on line 8, list the average volumes for each item in the last fiscal year:	
16		

FCC USE Identifier: |M|M|B| | | | | | | |1|2|B|

SCHEDULE 12 CONTINUED FIRST FRANCHISE AREA:
1992 TIERS, CHANNELS AND CHARGES

Line	Item:	
	BASIC TIER	
17	Subscribers to the basic tier	| | | | | | | | | |
	Number of:	
18	- local TV broadcast stations	| | |
19	- distant TV broadcast stations	| | |
20	- satellite-delivered cable network channels	| | |
21	- public educational government access channels	| | |
22	- other channels in the basic tier	| | |
23	Total number of channels in the basic tier	| | |
24	Monthly subscription charge $	| | . | |
	What other charges are incurred for the basic service tier? (Show amount and type of charge.)	
25		
	SECOND TIER	
26	Subscribers to this tier	| | | | | | | | | |
	Number of:	
27	- local TV broadcast stations	| | |
28	- distant TV broadcast stations	| | |
29	- satellite-delivered cable network channels	| | |
30	- public educational government access channels	| | |
31	- other channels in this tier	| | |
32	Total number of channels in this tier	| | |
33	Monthly subscription charge for this tier only $	| | . | |
	What other charges are incurred for the second tier? (Show amount and type of charge.)	
34		

FCC USE Identifier: |M|M|B| | | | | | | |1|2|C|

SCHEDULE 12 CONTINUED FIRST FRANCHISE AREA:
1992 TIERS, CHANNELS AND CHARGES

	THIRD TIER	
35	Subscribers to this tier	
	Number of:	
36	- local TV broadcast stations	
37	- distant TV broadcast stations	
38	- satellite-delivered cable network channels	
39	- public educational government access channels	
40	- other channels in this tier	
41	Total number of channels in this tier	
42	Monthly subscription charge for this tier only $.	
	What other charges are incurred for the third tier? (Show amount and type of charge.)	
43		

	ALL CHANNELS IN THIS FRANCHISE AREA	
44	Total channels in basic tier (as in line 23)	
45	Total channels in second tier (as in line 32)	
46	Total channels in third tier (as in line 41)	
47	Total channels in any other tiers	
48	Total pay channels	
49	Total pay-per-view channels	
50	Any other channels in this franchise area	
51	Total of all channels in this franchise area	

FCC USE	Identifier: |M|M|B| | | | | | | |1|3|A|

SCHEDULE 13 **FIRST FRANCHISE AREA: 1986 TIERS, CHANNELS AND CHARGES**

Line	Item:		
A.1	Did the system provide programming services in this franchise area in November 1986? (Circle one.)	**Yes**	**No**

If you answered "Yes" on line A.1, you must complete the rest of Schedule 13 to the best of your ability.

If you answered "No" on line A.1, skip the rest of Schedule 13.

A.2	As of November 30, 1986, was the franchise area rate regulated? (Circle one.)	**Yes**	**No**

Provide the information required on the next three pages for:

- o equipment and supplementary charges;
- o the basic tier as provided in this franchise area;
- o each of the two other tiers which had the most subscribers; and
- o all channels in the franchise.

All charges and subscriber information provided in this Schedule should be as of November 30, 1986.

FCC USE Identifier: |M|M|B| | | | | | | |1|3|B|

SCHEDULE 13 CONTINUED **FIRST FRANCHISE AREA: 1986 TIERS, CHANNELS AND CHARGES**

Line	Item:	
	EQUIPMENT AND SUPPLEMENTARY CHARGES	
	Average charges as of November 30, 1986:	
1	- installation fee	$| | . | |
2	- disconnect fee	$| | . | |
3	- reconnect fee	$| | . | |
4	- monthly converter box rental	$| | . | |
5	- monthly remote control rental	$| | . | |
6	- monthly additional outlet fee	$| | . | |
7	- tier changing fee	$| | . | |
	List any other equipment and supplementary charges which are not included in lines 1 through 7? (Show amount and type of charge.)	
8		
	For the fiscal year which included November 30, 1986, give the number of:	
9	- installations provided	| | | | | | |
10	- disconnections	| | | | | | |
11	- reconnections	| | | | | | |
	For the same fiscal year, give the average number of:	
12	- converter boxes rented	| | | | | | |
13	- remote control units rented	| | | | | | |
14	- additional outlets charged for	| | | | | | |
15	- tier changes charged for	| | | | | | |
	If you listed any additional charges on line 8, list the average volumes for each item in the same fiscal year:	
16		

FCC USE Identifier: |M|M|B| | | | | | | |1|3|C|

SCHEDULE 13 CONTINUED **FIRST FRANCHISE AREA: 1986 TIERS, CHANNELS AND CHARGES**

Line	Item:	
	BASIC TIER	
	As of November 30, 1986, give the number of:	
17	Subscribers to the basic tier	| | | | | | | | |
18	- local TV broadcast stations	| | |
19	- distant TV broadcast stations	| | |
20	- satellite-delivered cable network channels	| | |
21	- public educational government access channels	| | |
22	- other channels in the basic tier	| | |
23	Total number of channels in the basic tier	| | |
24	Monthly subscription charge	$| | . | |
	What other charges were incurred for the basic service tier? (Show amount and type of charge.)	
25		
	SECOND TIER	
	As of November 30, 1986, give the number of:	
26	Subscribers to the second tier	| | | | | | | | |
27	- local TV broadcast stations	| | |
28	- distant TV broadcast stations	| | |
29	- satellite-delivered cable network channels	| | |
30	- public educational government access channels	| | |
31	- other channels in this tier	| | |
32	Total number of channels in this tier	| | |
33	Monthly subscription charge for this tier only	$| | . | |
	What other charges were incurred for the second tier? (Show amount and type of charge.)	
34		

FCC USE Identifier: |M|M|B| | | | | | | |1|3|D|

SCHEDULE 13 CONTINUED **FIRST FRANCHISE AREA: 1986 TIERS, CHANNELS AND CHARGES**

	THIRD TIER
	As of November 30, 1986, give the number of:
35	Subscribers to the third tier | | | | | | | | |
	Number of:
36	- local TV broadcast stations | | |
37	- distant TV broadcast stations | | |
38	- satellite-delivered cable network channels | | |
39	- public educational government access channels | | |
40	- other channels in this tier | | |
41	Total number of channels in this tier | | |
42	Monthly subscription charge for this tier only $| | . | |
	What other charges are incurred for the third tier? (Show amount and type of charge.)
43	

	ALL CHANNELS IN THIS FRANCHISE AREA
	As of November 30, 1986, give the number of:
44	Total channels in basic tier (as in line 23) | | |
45	Total channels in second tier (as in line 32) | | |
46	Total channels in third tier (as in line 41) | | |
47	Total channels in any other tiers | | |
48	Total pay channels | | |
49	Total pay-per-view channels | | |
50	Any other channels in this franchise area | | |
51	Total of all channels in this franchise area | | | |

Respondents Guide to
Cable TV System Operators Rate Structure Questionnaire

GENERAL INFORMATION

The purpose of this questionnaire is to provide information to aid the Federal Communications Commission's implementation of rate regulation required as part of the **Cable Television Consumer Protection and Competition Act of 1992** (the 1992 Cable Act). This questionnaire is issued pursuant to FCC Order 92-545.

The questionnaire has been sent to selected franchise areas or community units as recorded on current FCC and other information systems. (For the purposes of this questionnaire, the terms franchise area and community unit are synonymous.) However, the questionnaire is aimed at system information and should be completed on a system-wide basis. In many instances, systems completing this questionnaire will comprise many franchise areas.

For systems that are part of a multiple system operator (MSO), some questions may require information from regional, state or corporate center management. Use your best judgement about which officers in the MSO organization are best suited to respond to, or provide information for, particular questions.

The information required by the questionnaire is necessary to help provide an understanding of what determines charges in the cable industry. The data collected will be used in an analytical database to assess general cable industry rate relationships. This information could be used to establish rate regulations of general applicability to the cable industry. The information will not be used for separate regulation of individual systems required to respond to this questionnaire.

Some of the questions require information which you may not know precisely. The Commission does not expect you to undertake significant additional analysis in order to respond to the questionnaire, but all questions should be answered to the best of your ability with the best information readily available.

If, after you have read each question and the related part of the guidelines, the information required by the Commission is not clear, you should discuss the question with the appropriate officers of the Federal Communications Commission. If you have any questions contact:

- Ms. Florence Setzer (202) 653-5940 or
- Ms. Jane Frenette (202) 634-1861.

Unless otherwise stated, all information should be provided as of September 30, 1992.

COVER PAGE

You should give both the legal name of the system and the name under which it does business on the spaces provided on the cover page.

A responsible officer of the organization is required to sign at the bottom of the cover page that the questionnaire has been examined by the officer, that the reported facts are true and that the data reported in the questionnaire provide an accurate statement of the affairs of the respondent in respect to the data set forth.

The signed cover page, including the label, must be returned with the original and three copies of the full questionnaire by Friday, January 22, 1993 to:

Cable Television Branch
Room 244
Federal Communications Commission
Washington DC, 20554
Attn: Rate Questionnaire

SCHEDULE 1

On lines 1 and 2 of Schedule 1, identify the cable system responding to the questionnaire by both its legal name and the name under which it does business. On line 3 give the city (or town), county and state in which the system is located.

On lines 4 through 12 list all community units in the cable system, the zip code of the community unit, the six digit FCC community unit ID number and the name of the franchise authority responsible for each community unit's cable service. If there are not enough lines available you should copy Schedule 1, complete one line for each community served by the cable system, and attach the copy to the original Schedule 1.

On lines 13 and 14 give the name and city (or town) and state location of the individual(s) or organization with controlling ownership interest in the cable system.

On lines 15 and 16 give the name and telephone number of the contact officer responsible for ensuring the questionnaire is accurately completed. The Commission may address follow up questions for clarification to this contact officer. The contact officer should keep a copy of the completed questionnaire in a convenient location.

On lines 17 and 18 give the name and phone number of a contact officer at the franchise authority for the franchise area to

which this questionnaire is addressed. The Commission may also address follow up questions for clarification to this officer.

SCHEDULE 2

The second Schedule requires information about characteristics of the cable system. This information will be used to generalize rate and other data provided in response to this questionnaire.

On lines 1 through 4 give the best readily available estimates of the number of households in the area served by the system, households passed by system distribution plant, the number of subscribing households and the number of addressable subscribers. These are general terms frequently used in the cable industry.

On line 5 describe the type of addressability in general terms. If there is more than one type of addressability used describe the main type in use as of September 30, 1992.

On lines 6 through 11 provide the best readily available information about the physical structure of the system. "Headend" is the generally understood term for a reception center from which trunk and distribution cable carry cable programs. The age of the headend is the number of years since the main reception equipment was put in place at the principal headend. The line miles of distribution plant includes trunk lines and feeder lines. Lines 9 and 10 should add to 100%. Line 11 should usually be less than 100%.

Indicate your answer to the questions on lines 12 and 13 by circling the appropriate response. If your answer on line 13 is "Yes", give the total number of systems operated by the MSO on line 14.

SCHEDULE 3

Schedule 3 requires information on system revenues for the latest completed fiscal year. In some systems the revenue information may not be kept with local system management. In this case, Schedule 3 should be completed by the part of the organization responsible for recording revenue and maintaining revenue records.

All revenue figures should be provided in dollars; cents should be omitted. You may round the revenue figure to the nearest thousand dollars.

The ending date of the latest completed fiscal year should be shown on line 1.

On lines 2 through 12 provide the best available estimate of annual system revenue for each of the items listed.

On line 13 give the total of all annual system revenue. This should be the sum of amounts on lines 2 through 12.

On line 14 list all of the significant items of "other revenue" included in the figure on line 12.

On line 15 you should provide an objective judgement about the value of any non-revenue benefits derived from owning or operating the cable system. These would include all taxable benefits and the value of any unpaid promotional advertising or other benefits received by the system.

On line 16 list all of the significant items of "non-revenue benefits" included in the figure on line 15.

SCHEDULE 4

Schedule 4 requires information about forms of possible competition in any franchise areas in the system. You are required to indicate if any franchise areas in the system meet the three definitions outlined on lines 1, 3 and 5 by circling "Yes" or "No".

If the answer to any of these questions is "Yes", on the following lines you must list the franchise areas which meet each definition and provide your best estimate of the other information required.

SCHEDULE 5

Schedule 5 requires information on the characteristics of the franchise area to which this questionnaire is addressed. This is the "first franchise area".

On lines 1 and 2 give the name of the franchise area to which this questionnaire is addressed and its six digit FCC Community Unit ID number.

The remaining information required in Schedule 5 for the first franchise area is of the same type as required on Schedule 2 for the whole system. Schedule 5 should therefore be completed in a similar way as Schedule 2. Responses in Schedule 5 should be consistent with those in Schedule 2.

SCHEDULE 6

Schedule 6 requires information on franchise authority fees and charges for the latest completed fiscal year (the same year as in line 1 of Schedule 3) for the franchise area to which the questionnaire was addressed. The schedule requires both the total paid and how it is calculated.

You should include only fees, taxes and charges which are specific to the cable industry. Do not include general taxes such as sales tax or company tax.

You should give the total franchise fees paid for this franchise area on line 1. On lines 2, 3 and 4 you should show how this amount is calculated or charged by the franchise authority. You should provide either the amount per subscriber, the percentage of basic subscriber revenue or the percentage of total subscriber revenue, whichever best reflects the way the fee is incurred.

If the fee is incurred in some other way, or if there are any other fees, taxes or charges by the franchise authority, you should show these on line 6.

If there are any other fees, taxes or charges included on line 6, you should show the charge, the frequency of payment and how the total amount is calculated for each type of franchise fee, tax or charge. For example, the charge multiplied by the number of subscribers multiplied by the frequency of payment equals the total amount paid in the latest fiscal year.

You should indicate on lines 5 and 7, as appropriate, if any of these fees, taxes or charges appear on subscriber's monthly bills as separate line items.

SCHEDULE 7

Schedule 7 requires charges and volume information for the first franchise area including equipment and supplementary charges and total channels and, for each of three tiers, information on subscribers, channels and charges.

All charges, channels and subscriber information should be as of September 30, 1992.

On lines 1 through 8 you should provide all equipment and supplementary charges. Supplementary charges include charges for any service other than programming related to providing cable TV services. Where any charge varies within a category (for instance if advertised or listed charges are not always charged) you should show the amount charged on average.

All equipment and supplementary charges not provided in lines 1 through 7 should be shown on line 8. You should show both the type of charge and the average amount charged.

On lines 9 through 16 you should provide the volumes of all equipment and supplementary items. On lines 9, 10 and 11 give the total number of installations, disconnections and reconnections charged for in the last completed fiscal year.

On lines 12, 13 and 14 you should provide either the number of converter boxes, remote control units and additional outlets rented on September 30, 1992 or the average number rented over the last completed fiscal year, whichever best represents the average volume. On line 15 you should provide the total number of tier changes which were charged for in the last completed fiscal year.

On line 16 you should provide the volumes in the last completed fiscal year of any other equipment and supplementary items listed on line 7.

On lines 17 through 43, charges and other information are required for each of three different tiers of service. The three tiers are:

(i) the basic tier, as it was provided in the franchise area;

(ii) after basic, the tier with the most subscribers; and

(iii) after basic, the tier with the second most subscribers.

The basic tier is the lowest tier provided by the system and generally includes retransmitted over-the-air signals. Tiers do not include single pay channels (such as separately charged premium channels), groups of channels offering the same pay service with different scheduling or pay-per-view channels.

Where tiers are provided on a "buy-through" basis, you should not include the price for any "buy-through" tier in your responses to the charge questions. All prices should be provided as the additional amounts charged for that tier only.

Your responses for each of the three tiers should include all prices and all channels in the relevant tiers but should not show any franchise fees, taxes or charges where these appear as separate line items on subscribers monthly bills.

On lines 44 through 47 give the total number of channels in each of the basic tier, the second tier and the third tier (which are the same amounts shown at lines 23, 32 and 41) as well as the total channels in any other tiers.

On lines 48 through 50 give the number of pay channels, pay-per-view channels and any other channels provided.

On line 51 give the total number of channels provided in the franchise. This should be the total of all the channels given in lines 44 through 50.

SCHEDULE 8

On line A.1 of Schedule 8 indicate whether the system provided program services in November, 1986 by circling the appropriate response. If the system did provide such services you must show on line A.2 whether the system was subject to rate regulation on November 30, 1986 (by circling the appropriate response) and then complete the rest of Schedule 8 to the best of your ability.

If the system did not provide programming services in this franchise area in November 1986 you may skip the rest of Schedule 8 and go to Schedule 9.

The remainder of Schedule 8 requires much the same information as Schedule 7, but for the earlier date, including all equipment and supplementary charges and volumes and all charges and channels for each of the three service tiers.

You should use whatever records are available to complete Schedule 8 to the best of your ability including any rate cards, subscriber bills, promotional material and management or company reports or records from that period.

SCHEDULE 9

Schedule 9 is intended to provide information on differences in services and charges among franchise areas served by the system. Among other things, you will use this information to determine the franchise area for which to provide information in Schedules 10 through 13 - the second franchise area.

If the system has only one franchise area (as listed on Schedule 1) you do not need to complete Schedules 9 through 13.

On lines 1 and 3 of Schedule 9 indicate whether all franchise areas served by the system have the same prices and channel lineups by circling the appropriate response.

If you answer "No" on line 1, show on line 2 how many different price schedules there are in franchise areas in the system.

If you answer "No" on line 3, show on line 4 how many different channel lineups there are in franchise areas in the system.

Different prices means either different amounts of charges or a different structure of charges (different types of charges for equipment or tiers). Different channel lineup means a different number of channels or stations or different channels or stations in any tier. (It does not refer to the channel number or the position of channels or stations on the dial of a television set!)

If all franchise areas have the same prices and channels (that is, if you have answered "Yes" on both lines 1 and 3) you should go to line 5 on page 18. Otherwise you should go to line 8 on page 19.

If all franchise areas have the same prices and channels:

- Refer to Schedule 4 and indicate by circling "Yes" or "No" on line 5 of Schedule 9 whether you listed any franchise areas on lines 2, 4 or 6 of Schedule 4 (other than the franchise area to which the questionnaire is addressed: the first franchise area).

- If you did list any franchise areas in Schedule 4, you should give the name on line 6 (of Schedule 9) of the franchise area listed in Schedule 4 which has the most subscribers (not including the first franchise area).

- If you did not list any franchise areas in Schedule 4, you should refer to Schedule 1 and give the name on line 7 (of Schedule 9) of the franchise area listed in Schedule 1 which has the most subscribers (not including the first franchise area).

If some or all franchise areas have different prices and channels:

- Refer to Schedule 4 and indicate by circling "Yes" or "No" on line 8 of Schedule 9 whether you listed any franchise areas on lines 2, 4 or 6 of Schedule 4 (other than the franchise area to which the questionnaire is addressed: the first franchise area).

- If you did list any franchise areas in Schedule 4, you should:

  (i) on line 9 give the number of different price structures which apply in the franchise areas listed in Schedule 4;

  (ii) on line 10 give the number of different channel lineups which apply in the franchise areas listed in Schedule 4; and

  (iii) on line 11 give the name of the franchise area listed in Schedule 4 which has the most subscribers (not including the first franchise area) and different prices or channel lineup to the first franchise area.

- If you did not list any franchise areas in Schedule 4, you should refer to Schedule 1 and give the name on line 12 (of Schedule 9) of the franchise area listed in Schedule 1 which has the most subscribers (not including the first franchise area) and different prices or channel lineup from the first

franchise area.

Once you have completed Schedule 9 you should have provided the name of a second franchise area (other than the franchise area to which the questionnaire is addressed) on either of lines 6, 7, 11 or 12.

If all franchise areas have the same prices and channels you should now complete Schedules 10 and 11 for the second franchise area identified on line 6 or 7. You do not need to complete Schedules 12 and 13 if all franchise areas in the system have the same prices and channels.

If some or all franchise areas have different prices and channels you should now complete Schedules 10 through 13 for the second franchise area identified on line 11 or 12.

SCHEDULES 10 THROUGH 13

Schedules 10 through 13 require the same information for the second franchise area as Schedules 5 through 8 required for the first franchise area. You should follow the same instructions as for Schedules 5 through 8.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-261

In the Matter of

Implementation of Section 22
of the Cable Television
Consumer Protection and
Competition Act of 1992

Equal Employment Opportunities

NOTICE OF PROPOSED RULE MAKING

Adopted: December 10, 1992; Released: January 5, 1993

Comment date: February 16, 1993
Reply comment date: March 4, 1993

By the Commission:

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I. INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992, ("Cable Act of 1992.") Pub. L. No. 102-385, _____ Stat. _____ (1992) was enacted. By this *Notice of Proposed Rulemaking*, we propose to amend our rules to implement the equal employment opportunity (EEO) provisions (*See* Appendix B) set forth in Section 22 of the Cable Act of 1992.

II. BACKGROUND

2. Since 1969 and 1972 respectively, the Commission has imposed equal employment opportunity standards on the broadcast and cable industries.[1] Broadcast television stations and cable television operators, including satellite master antenna operators,[2] may not discriminate in their employment practices due to gender, race, color, religion, or national origin. They also must afford equal opportunity in employment to all qualified persons.[3] In addition, both broadcast television stations and cable operators must establish and maintain an equal employment opportunity program designed to provide equal opportunity for minorities and women in all aspects of their employment policies and practices. The EEO review processes for broadcast stations and cable operators are similar in that, in both cases, the Commission's primary focus is on the efforts engaged in to recruit, hire and promote qualified minorities and women. However, the type of information relied upon in reviewing EEO programs, the frequency with which Commission review occurs and the types of remedies and sanctions which can be imposed in the face of non-compliance differ for the two industries.

3. Unlike cable systems, broadcast television stations are not subject to an annual review. Their EEO compliance is reviewed every five years during the license renewal process.[4] As part of their renewal applications, broadcast stations with five or more full-time employees are required to file an "Equal Employment Opportunity Program Report" (Form 396) which requests general information concerning recruitment sources contacted; the race and gender of referrals received from recruitment sources; and the number, race and gender of all employees promoted and hired during the 12-month period prior to filing the renewal application. *See* Appendix D. Licensees also are required to file an Annual Employment Report (Form 395-B) on a yearly basis.[5] *See* Appendix E. These reports, which set forth the station's employment statistics by job categories, are reviewed only when the station applies for renewal.[6] When reviewing a broadcaster's EEO compliance at renewal time, the Commission's primary focus is on the

[1] In 1984, our cable EEO rules were codified in Section 634 of the Communications Act of 1934, by the Cable Act of 1984. *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, Section 1 *et. seq.* 98 Stat. 2779 (1984). The Cable Act of 1992 codifies our broadcast EEO Rule (47 C.F.R. Section 73.2080) as well as our EEO reporting forms as they apply to broadcast television stations. *See* Cable Act of 1992, adding Section 334(a) of the Communications Act of 1934.

[2] These requirements apply to broadcast radio stations as well but Congress has not specifically codified in the Communications Act EEO provisions for radio stations.

[3] Protected minority groups are the same for broadcast and cable and are limited to: Blacks, Hispanics, Asian/Pacific Islanders and American Indians.

[4] Licensees of television stations also must file a Model EEO Program Report (Form 396-A) as part of any application for construction permit, assignment or transfer of control of license. *See* Appendix C.

[5] *See* 47 C.F.R. Section 73.3612.

[6] The Commission also takes cognizance of any final determinations reached concerning complaints of employment discrimination against broadcasters filed with government agencies and/or courts established to enforce nondiscrimination laws. *See Memorandum of Understanding between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 FCC 2d 2320 (1978) (agreement between FCC and EEOC regarding the handling of employment discrimination complaints against broadcasters).

licensee's overall efforts.[7] If a broadcast station is found to be in compliance with the Commission's broadcast EEO Rule, 47 C.F.R. Section 73.2080, renewal is granted. If, however, it is not in compliance, the Commission may impose a variety of remedies or sanctions such as admonishment, reporting conditions,[8] renewal for less than a full term and/or a forfeiture. If the facts so warrant, the Commission will designate the renewal application for hearing to determine whether renewal of license should be granted or denied.[9]

4. In contrast, the Commission reviews EEO programs of cable systems and headquarter units with more than five full-time employees on an annual basis. This review begins when the cable operator files its Annual Employment Report (Form 395-A), which must be submitted on or before May 1st of every year by all cable systems employing six or more full-time employees.[10] The Form 395-A requires answers to nine questions about the cable operator's EEO efforts;[11] the number, race, gender and job classification of each full and part-time employee on the system's work force;[12] the number, race and gender of all employees promoted during a 12-month period; and the number, race and gender of all new hires (both overall and upper-level) during the same 12-month period. *See* Appendix F. In addition, cable operators are required to complete a Supplemental Investigation Sheet (SIS) every five years.[13] This sheet requests additional specific information regarding recruitment efforts and job classifications. The Form 395-A, along with any additional information, is reviewed using a two-step process which involves a statistical analysis of the cable system's work force and a review of the system's responses to questions regarding its EEO efforts. In addition, the Commission examines any EEO complaints that may have been filed against a cable system.[14] If a system appears to be in compliance with the Commission's cable EEO rules,[15] it is granted certification for that year. If the Commission finds that the system is not engaging in sufficient efforts or is not attracting a diverse pool of applicants, additional inquiries are made. If, based on the Form 395-A report and responses to subsequent inquiries, it is determined that the system is not in compliance, certification is denied. When certification is denied, the Commission may impose various remedies or sanctions, including admonishing the system to correct any identified problems; imposing reporting conditions; or, where appropriate, issuing a forfeiture.[16] Finally, in addition to the annual review and the five year investigation, the Commission conducts on-site reviews of cable systems to verify its EEO program and assure that employees are properly classified.

III. DISCUSSION

Mid-term Review for Broadcast Television Stations

5. Section 22(f) of the Cable Act of 1992 mandates that the Commission conduct a mid-term review of television broadcast station licensees' "employment practices." This section also requires the Commission to inform such licensees of necessary improvements in recruitment practices identified as a result of the review.[17] Although the statute is silent as to the criteria to be used for this mid-term review, the Conference Report provides specific guidance.[18] It states that the Commission should compare the workforce data submitted in the first two annual employment reports filed following grant of renewal with the relevant labor force data the Commission would customarily use (MSA or county). The FCC internal processing guidelines in effect as of September 1, 1992[19] would then be applied to the results of the above comparison.[20]

6. The referenced criteria consist of a comparison of the composition of the stations' employment profile with the relevant labor force area as follows. First, stations with five to 10 full-time employees would meet the guidelines if the proportion of minority and female representation in their overall staffs is at least 50% of that of the relevant labor force, and in the upper-level job categories at least 25% of that of the relevant labor force. Second, stations with 11 or more full-time employees would meet the guidelines if the proportion of minority and female representation is at least 50% of that of the relevant labor force, and in the upper-level job categories at least 50% of that of the relevant

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[7] This evaluation is a two-step process. Initially, the Commission reviews information in the licensee's renewal application (Form 396) and compares the station's workforce, as reflected in the Form 395-B reports, with the available labor force. *See Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO*), *petition for reconsideration pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification of the National Association of Broadcasters). If the first step indicates that the station's EEO efforts are satisfactory, the station is accepted as having fulfilled its obligations. However, if the initial analysis indicates that a station's efforts may have been less than satisfactory, it is subjected to a second-step analysis of those areas where its efforts appear deficient.

[8] Generally, stations under reporting conditions are required to submit three successive annual progress reports detailing their hiring and recruitment practices.

[9] *See Broadcast EEO, supra; Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978).

[10] *See* 47 C.F.R. Section 76.77.

[11] The nine questions are modelled after the requirements of Section 634(d)(2) of the Communications Act of 1934, as amended, 47 U.S.C. Section 554(d)(2) and 47 C.F.R. Section 76.75.

[12] The present job classifications include: 1) Officials & Managers; 2) Professionals; 3) Technicians; 4) Salesworkers; 5) Office & Clerical; 6) Craftworkers (skilled); 7) Operatives (semi-skilled); 8) Laborers (unskilled); and 9) Service Workers.

[13] *See* Section 634(e)(2) of the Communications Act, as amended, 47 U.S.C. Section 554(e)(2); 47 C.F.R. Section 76.77.

[14] Concerning EEO complaints, if the FCC receives any adjudicated findings of discrimination, it will generally deny certification and take any other appropriate action. In most cases, an unresolved complaint is not a basis for denial of certification.

[15] *See* 47 C.F.R. Section 76.75.

[16] *See* Section 634(f)(1) of the Communications Act, as amended, 47 U.S.C. Section 554(f)(1).

[17] *See* Section 22(f) of the Cable Act of 1992, adding 47 U.S.C. Section 334(b).

[18] *See* House Committee on Energy and Commerce, H.R. Rep. No. 102-862, 102d Cong. 2d Sess. (1992), reprinted at Cong. Rec. H 8308, H 8333-8334 (daily ed. September 14, 1992) (hereinafter "Conference Report").

[19] *See* Conference Report, at H 8334.

[20] The Conference Report states that the mid-term review "is not intended to establish and shall not be considered or utilized in any manner as establishing a quota for the employment of members of any societal group." *See* Conference Report, at H 8334.

labor force. Availablity in the labor force is determined by the applicable metropolitan statistical area (MSA) or relevant county statistics.[21]

7. Because the language in the statute states that the mid-term review is of "employment practices," the amendment could conceivably be read to require an EEO efforts-type of analysis that would go beyond measuring a broadcast licensee's employment profile against the processing guidelines. However, given the general nature of the statutory language in Section 22(f) and the much more specific language in the Conference Report, it is our initial conclusion that the language in the Conference Report should be followed. We seek comment on our initial view as to the criteria to be used for the mid-term review.

8. The statute also is silent as to precisely when the mid-term review is to occur. However, the Conference Report states that the first two Forms 395-B submitted after grant of license renewal are to be used for the review.[22] Broadcast television stations are required to file annual employment reports by May 31st of each year.[23] This report requires the filing of data on the number, gender, and race or national origin of full and part-time employees in each of the nine job categories during a selected payroll period in January, February or March. We propose to use for the mid-term review the first two annual employment reports filed after the expiration date of the station's license period as stated in Section 73.1020 of the Commission's rules.[24] This review should commence as soon as possible after the filing of the second employment report or approximately two and one-half years following the uniform expiration date of licenses by the renewal group. This will ensure that all stations within a renewal group are reviewed based on a similar time period. We seek comment on this proposal.

9. Section 22(f) requires the Commission to inform licensees "of necessary improvements in recruitment practices identified as a consequence of such review."[25] For example, we could inform licensees not meeting the processing guidelines that their overall recruitment efforts might need greater attention and should be the focus of more intense self-assessment. We seek comment on this approach. We also note that the language in Section 22(f) is unclear as to whether all stations should receive a letter as a result of this review or only those stations needing improvement. The Conference Report, however, suggests that only licensees with deficient "employment practices" need to receive a letter.[26] We seek comment on our proposal that, while all broadcast television stations should be reviewed at mid-term, letters need be sent only to those with identified deficiencies.

10. Next, we seek comment on what effect the mid-term review should have on a subsequent renewal. The statute is silent on this issue, while the Conference Report states that the review letter "is not and is not to be treated for any purpose as a Commission sanction ...."[27] Thus, the Conference Report suggests that a finding of deficiency should constitute nothing more than an early warning that a licensee's overall EEO efforts may need improvement. However, because the mid-term review, under our proposal, would consist of an analysis of only one aspect of our EEO efforts-based renewal evaluation, the mid-term review would not establish compliance with our EEO Rule. Thus, we tentatively conclude that the EEO program of a licensee that failed to receive a deficiency letter would not be treated as being in compliance with the EEO Rule at renewal time merely because no mid-term deficiency letter was received. We seek comment on these matters.

Cable Industry Equal Employment Opportunity

11. Congress' apparent intent in amending the EEO provisions of the Communications Act as they apply to cable systems was to increase attention to the representation of minorities and females in managerial positions within the cable industry.[28] Thus, the Act requires the Commission to collect more specific employment data from cable entities, including separate information on the job title of each employee listed within the various job categories. The Act also expands the current nine job categories to 15. In addition, it raises the penalty for violating Section 634 from $200 for each violation to $500. The Act also amends the scope of the EEO requirements of Section 634 and our rules to include "any multichannel video programming distributor."

12. Section 22(c) amends Section 634(d)(3) of the Communications Act to add six new job categories: 1) Corporate Officers; 2) General Manager; 3) Chief Technician; 4) Comptroller; 5) General Sales Manager; and 6) Production Manager. Cable systems will be required to report the job title in addition to the number, gender and race of its employees listed in each of the 15 job categories. The purpose of the additional reporting requirements is to provide the Commission with an additional method of ensuring that employees are accurately categorized.[29] Further, Congress' apparent intent in expanding the number of job categories is to improve the Commission's ability to monitor industry employment trends as well as to evaluate the effectiveness of its rules and enforcement practices with respect to representation of women and minorities in decisionmaking and supervisory positions. We believe that the above satisfies the reporting requirements for cable employees in the 15 categories under the Act. We seek comment on this matter.[30]

13. We propose to implement the new full and part-time reporting requirements for cable systems by modifying Form 395-A to emulate Form 395-B used by broadcast stations. The latter reflects full and part-time employment separately. To collect the required job title information, we propose to add a new section to Form 395-A which will ask cable systems to list the job titles of employees within each of the 15 categories.[31] With respect to the six new job categories, we note that these are senior positions which

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[21] *See* Public Notice FCC 80-61 (released February 13, 1980). For example, based on a 40% available minority labor force, a station with 10 upper-level jobs (out of 12 full-time employees overall) will meet the criteria for upper-level jobs if at least two of the 10 (or 20%, *i.e.* 50% of 40%) are minorities.

[22] *See* Conference Report, at H 8334.

[23] *See* 47 C.F.R. Section 73.3612.

[24] *See* 47 C.F.R. Section 73.1020.

[25] *See* Section 22(f) of the Cable Act of 1992, adding 47 U.S.C. Section 334(b).

[26] *See* Conference Report, at H 8334.

[27] *See* Conference Report, at H 8334.

[28] *See* Section 22(a) of the Cable Act of 1992.

[29] *See* House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess., at 112 (1992), (hereinafter "House Report").

[30] *See* House Report, at 112.

[31] To alleviate additional paperwork burdens, we propose to

should be reported within the existing "officials and managers" category. Thus, we propose to collect employment profile data as well as recruitment, promotion and hiring information on the incumbents of these categories in a separate section. *See* Appendix G. We believe this method will protect the integrity of the trend report which the Commission has produced since 1972[32] and allow for comparisons with other industries using the standardized federal format. In addition, this method will allow us to monitor the trend of minority and female employment in these six new categories as designated by Congress. Comment is invited on these proposals as well as any additional proposals for fulfilling these new reporting requirements.

14. Next, the Act requires that the Commission define jobs to be included in the six new job categories "so as to ensure that only employees who are principal decision-makers and who have supervisory authority are reported." The Commission also is required to adopt rules defining the remaining nine job categories "in a manner that is consistent with the Commission's policies in effect on June 1, 1990."[33] Further, Congress authorizes the Commission to "utilize, reexamine and redefine all existing categories."[34] At this time, we see no need to reexamine the current definitions for the nine existing categories. It has been our experience that these definitions are, in fact, adequate. We therefore propose to adopt the current definitions of the nine remaining job categories into our cable EEO rules.[35]

15. The definitions of jobs to be included in our current nine job categories were determined by the Office of Management and Budget and are used government-wide in evaluating all industries. We have been unable to locate any sources or agencies which use or define job categories as specific as the six new categories required by the Act. Nonetheless, based on our review of job definitions currently used by some companies in the cable industry, we propose to define the six new job categories as outlined in Appendix H. Comment is invited on these proposed definitions as well as on other alternative definitions. In addition, we invite comment on whether there are pre-existing sources to which we can turn for guidance in developing definitions for the six new job categories.

16. We also seek comment on whether Section 22(c) requires the Commission to provide statistical information for the six new job categories. In order to assist cable systems in their self-assessment, the Commission currently provides statistical data to individual cable systems that reflect the composition of the relevant available labor force in the aggregate as well as for each of the nine job categories. *See* Appendix I. While Section 22(c) could be viewed as requiring the Commission to provide statistical data for each of the new categories, we believe the better interpretation is that the new categories be incorporated into the upper-four job categories evaluation. In this regard, the House Report indicates that the Commission should include the six new categories in evaluation of the upper-level positions following our current process.[36]

17. Section 22(c) amends Section 634(d)(3) to require cable operators to make annual employment reports available for public inspection at the entity's central location and at every location where more than five full-time employees are regularly assigned to work.[37] This filing already is required now by our rules.[38] Thus, we do not need to amend our rules to accommodate this provision.

18. In addition, we note that the language of Section 22(c) includes the term "qualified minorities and women in the relevant labor market." The House Report states that our "method of comparing the composition of the cable operator's workforce with that of the relevant labor market has not been changed...."[39] We do not believe that Congress intended the Commission to engage in a competency-based analysis which it currently does not employ. We seek comment on the above.

19. Section 634(f)(2) of the Communications Act currently authorizes the Commission to impose a $200 forfeiture for each violation of the EEO provisions of the Act as well as our cable EEO rules.[40] Under this section, each day of a continuing violation is considered a separate offense.[41] Congress has now amended Section 634(f)(2) of the Communications Act by increasing the penalty for noncompliance from $200 to $500.[42] Accordingly, the higher forfeiture amounts will be applied to future cable EEO actions, as appropriate.

20. Finally, Section 22(e) amends Section 634(h)(1) to include within the definition of "cable operator" for EEO purposes any "multichannel video programming distributor."[43] This term is defined as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming."[44] We seek comment on our proposal to amend Section 76.71(a) of our rules by adding "and any multichannel video programming distributor" and to adopt the statute's definition of this term in a new subsection (jj) to Section 76.5 of our rules.[45]

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attach one copy of this section to each Form 395-A. We also would allow systems to make additional copies of the section as needed.

[32] The report, compiled from the Annual Employment Reports filed yearly by the broadcasters and cable operators, reflects the total number of women and minorities employed in all job categories. It sets forth this data for each of the past five years.

[33] *See* Section 22(c) of the Cable Act of 1992, amending Section 634(d)(3) of the Communications Act of 1934, as amended, Section 47 U.S.C. Section 554(d)(3).

[34] *See* House Report, at 113.

[35] *See* Appendix H.

[36] *See* House Report, at 112.

[37] *See* Section 22(c) of the Cable Act of 1992, amending Section 634 of the Communications Act of 1934, as amended, 47 U.S.C. Section 554(d)(3).

[38] *See* 47 C.F.R. Section 76.79.

[39] *See* House Report, at 112.

[40] *See* 47 U.S.C. Section 554(f)(2).

[41] *See* 47 U.S.C. Section 554(f)(2).

[42] *See* Section 22(d) of the Cable Act of 1992, amending Section 634(f)(2) of the Communications Act of 1934, as amended, 47 U.S.C. Section 554(f)(2).

[43] The House Report indicates that this definition was expanded to reflect a belief that "it is important to ensure women and minorities equal employment and promotion opportunities in new, emerging, and alternative technologies." *See* House Report at 113.

[44] Section 2(c) of the Cable Act of 1992 amending Section 602 of the Communications Act of 1934.

[45] DBS broadcast stations currently are required to practice nondiscrimination and to establish an affirmative action program to afford equal employment opportunity for all persons.

See Appendix H. Because the same terminology is used in other parts of the 1992 Act, *e.g.* in connection with the effective competition definition (§3), retransmission consent requirements (§6), program ownership (§11), program carriage agreements (§12), and program access (9), this definition will also be the subject of discussion in other proceedings. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, MM Docket No. 92-259, FCC 92-259, para. 42 (1992).

IV. CONCLUSION

21. By this *Notice of Proposed Rule Making*, the Commission proposes to amend its rules to implement certain provisions of the Cable Television Consumer Protection Act of 1992. We request comment on any of the proposed rule changes discussed above. In addition, we encourage parties to submit comments with respect to any other sections of the Act that they believe may affect the Commission's EEO rules and regulations.

V. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

22. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice of Proposed Rule Making*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Notice of Proposed Rule Making*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

B. Ex Parte

23. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

C. Comment Dates

24. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **February 16, 1993,** and reply comments on or before **March 4, 1993.** To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

25. Authority for this proposed Rule Making is contained in Sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), (j), and 303 and Section 22 of the Cable Television Consumer Protection and Competition Act of 1992.

26. For further information on this proceeding, contact Lisa M. Higginbotham, Mass Media Bureau, at (202) 632-7069.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. *Reason for action.* This action is taken to implement the equal employment opportunity provisions of the Cable Television Consumer Protection and Competition Act of 1992.

II. *Objectives.* The legislation and this subsequent Commission action establish guidelines for the regulation of equal employment opportunity policy and practices in the cable and broadcast television industries. This proceeding is intended to institute a national policy to encourage employment opportunities for women and minorities and to ensure non-discrimination in the cable and broadcast television industries.

III. *Legal basis.* Action as proposed for this rule making is contained in Sections 4(i), (j) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 4(i), (j), and 303 and Section 22 of Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, _____ Stat. _____ (1992).

IV. *Reporting, recordkeeping and other compliance requirements.* Cable entities will be required to submit additional documentation as part of the Commission's investigation responsibilities as mandated by the Cable Act. The documentation requirement will be new only for licensees and permittees of DBS, MMDS and other systems which fall within the Act's definition of "multichannel video programming distributor."

Applicants for construction permits, for the assignment or transfer of control of such permits, and for renewal of license must file EEO programs for minorities and women. Moreover, all licensees and permittees with five or more full-time employees must file annual employment reports on the Form 395. *See* 47 C.F.R. Section 100.51(a), (b), (c), (d).

V. *Federal rules which overlap, duplicate or conflict with this rule.* None.

VI. *Description, potential impact and number of small entities affected.* In order to implement the equal employment opportunity provisions of the Cable Act of 1992, the Commission has proposed to modify some rules and add new rules. The Cable Act of 1992's definition of systems subject to the EEO provisions differs in some respect from our current requirements. If we adopt the Cable Act's definition of a cable system as we have proposed, we believe the following additional entities will be affected. Licensees and permittees of direct broadcast satellite systems (DBS) and multichannel, multipoint distribution service could now come under the scope of our cable EEO regulations.

VII. *Any significant alternatives minimizing impact on small entities and consistent with stated objective.* None.

PAPERWORK REDUCTION ACT IMPLICATIONS

I. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burdens upon the public. Implementation of any new or modified requirements or burden will be subject to approval by the Office of Management and Budget as prescribed by the Act.

APPENDIX B

Section 22 of the Cable Act of 1992 reads as follows:

SEC. 22. EQUAL EMPLOYMENT OPPORTUNITY.

(a) Findings.--The Congress finds and declares that--

(1) despite the existence of regulations governing equal employment opportunity, females and minorities are not employed in significant numbers in positions of management authority in the cable and broadcast television industries;

(2) increased numbers of females and minorities in positions of management authority in the cable and broadcast television industries advances the Nation's policy favoring diversity in the expression of views in the electronic media; and

(3) rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination.

(b) Standards.--Section 634(d)(1) of the Communications Act of 1934 (47 U.S.C. 554(d)(1)) is amended to read as follows:

"(d)(1) Not later than 270 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, and after notice and opportunity for hearing, the Commission shall prescribe revisions in the rules under this section in order to implement the amendments made to this section by such Act. Such revisions shall be designed to promote equality of employment opportunities for females and minorities in each of the job categories itemized in paragraph (3).".

(c) Contents of Annual Statistical Reports.--Section 634(d)(3) of the Communications Act of 1934 (47 U.S.C. 554(d)(3)) is amended to read as follows:

"(3)(A)Such rules also shall require an entity specified in subsection (a) with more than 5 full-time employees to file with the Commission an annual statistical report identifying by race, sex, and job title the number of employees in each of the following full-time and part-time job categories:

"(i) Corporate officers.

"(ii) General Manager.

"(iii) Chief Technician.

"(iv) Comptroller.

"(v) General Sales Manager.

"(vi) Production Manager.

"(vii) Managers.

"(viii) Professionals.

"(ix) Technicians.

"(x) Sales Personnel.

"(xi) Office and Clerical Personnel.

"(xii) Skilled Craftspersons.

"(xiii) Semiskilled Operatives.

"(xiv) Unskilled Laborers.

"(xv) Service Workers.

"(B) The report required by subparagraph (A) shall be made on separate forms, provided by the Commission, for full-time and part-time employees. The Commission's rules shall sufficiently define the job categories listed in clauses (i) through (vi) of such subparagraph so as to ensure that only employees who are principal decisionmakers and who have supervisory authority are reported for such categories. The Commission shall adopt rules that define the job categories listed in clauses (vii) through (xv) in a manner that is consistent with the Commission policies in effect on June 1, 1990. The Commission shall prescribe the method by which entities shall be required to compute and report the number of minorities and women in the job categories listed in clauses (i) through (x) and the number of minorities and women in the job categories listed in clauses (i) through (xv) in proportion to the total number of qualified minorities and women in the relevant labor market. The report shall include information on hiring, promotion, and recruitment practices necessary for the Commission to evaluate the efforts of entities to comply with the provisions of paragraph (2) of this subsection. The report shall be available for public inspection at the entity's central location and at every location where 5 or more full-time employees are regularly assigned to work. Nothing in this subsection shall be construed as prohibiting the Commission from collecting or continuing to collect

statistical or other employment information in a manner that it deems appropriate to carry out this section.".

(d) Penalties.--Section 634(f)(2) of such Act (47 U.S.C. 554(f)(2)) is amended by striking "$200" and inserting "$500".

(e) Application of Requirements.--Section 634(h)(1) of such Act (47 U.S.C. 554(h)(1)) is amended by inserting before the period the following: "and any multichannel video programming distributor".

(f) Broadcasting Equal Employment Opportunity.--Part I of title III of the Communications Act of 1934 is amended by inserting after section 333 (47 U.S.C. 333) the following new section:

"SEC. 334. LIMITATION ON REVISION OF EQUAL EMPLOYMENT OPPORTUNITY REGULATIONS.

"(a) Limitation.--Except as specifically provided in this section, the Commission shall not revise--

"(1) the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees; or

"(2) the forms used by such licensees and permittees to report pertinent employment data to the Commission.

"(b) Midterm review.--The Commission shall revise the regulations described in subsection (a) to require a midterm review of television broadcast station licensees' employment practices and to require the Commission to inform such licensees of necessary improvements in recruitment practices identified as a consequence of such review.

"(c) Authority To Make Technical Revisions.--The Commission may revise the regulations described in subsection (a) to make nonsubstantive technical or clerical revisions in such regulations as necessary to reflect changes in technology, terminology, or Commission organization.".

(g) Study and Report Required.--Not later than 2 years after the date of enactment of this Act, the Commission shall submit to the Congress a report pursuant to a proceeding to review and obtain public comment on the effect and operation of the amendments made by this section. In conducting such review, the Commission shall consider the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting equality of employment opportunity and promotion opportunity, and particularly the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting the congressional policy favoring increased employment opportunity for women and minorities in positions of management authority. The Commission shall forward to the Congress such legislative recommendations to improve equal employment opportunity in the broadcasting and cable industries as it deems necessary.

APPENDIX C

Current 396-A

Federal Communications Commission
Washington, D.C. 20554

APPENDIX C

Approved by OMB
3060-0120
Expires 8/30/93

BROADCAST EQUAL EMPLOYMENT OPPORTUNITY

MODEL PROGRAM REPORT

1. APPLICANT

Name of Applicant	Address
Telephone Number (include area code)	

2. This form is being submitted in conjunction with:

☐ Application for Construction Permit for New Station ☐ Application for Assignment of License

☐ Application for Transfer of Control

(a) Call letters (or channel number of frequency) _____ _____

(b) Community of License (city and state) _____ _____

(C) Service:

☐ AM ☐ FM ☐ TV ☐ Other (Specify) _____

INSTRUCTIONS

Applicants seeking authority to construct a new commercial, noncommercial or international broadcast station, applicants seeking authority to obtain assignment of the construction permit or license of such a station, and applicants seeking authority to acquire control of an entity holding such construction permit or license are required to afford equal employment opportunity to all qualified persons and to refrain from discrimination in employment and related benefits on the basis of race, color, religion, national origin or sex. See Section 73.2080 of the Commission's Rules. Pursuant to these requirements, an applicant who proposes to employ five or more full-time employees must establish a program designed to assure equal employment opportunity for women and minority groups (that is, Blacks not of Hispanic origin, Asians or Pacific Islanders, American Indians or Alaskan Natives and Hispanics). This is submitted to the Commission as the Model EEO Program. If minority group representation in the available labor force is less than five percent (in the aggregate), a program for minority group members is not required. In such cases, a statement so indicating must be set forth in the EEO model program. However, a program must be filed for women since they comprise a significant percentage of virtually all area labor forces. If an applicant proposes to employ fewer than five full-time employees, no EEO program for women or minorities need be filed.

Guidelines for a Model EEO Program and a Model EEO Program are attached.

NOTE: Check appropriate box, sign the certification below and return to FCC:

☐ Station will employ fewer than 5 full-time employees; therefore no written program is being submitted.

☐ Station will employ 5 or more full-time employees. Our Model EEO Program is attached. (You must complete all sections of this form.)

I certify that the statements made herein are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

Signed and dated this _____ day of _____, 19___

Signed _____

Title _____

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION, PERMIT (U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

FCC Form 396-A
September 1991

GUIDELINES TO THE MODEL EEO PROGRAM

The model EEO program adopted by the Commission for construction permit applicants, assignees and transferees contains five sections designed to assist the applicant in establishing an effective EEO program for its station. The specific elements which should be addressed are as follows:

I. GENERAL POLICY

The first section of the program should contain a statement by the applicant that it will afford equal employment opportunity in all personnel actions without regard to race, color, religion, national origin or sex, and that it has adopted an EEO program which is designed to fully utilize the skills of qualified minorities and women in the relevant available labor force.

II. RESPONSIBILITY FOR IMPLEMENTATION

This section calls for the name (if known) and title of the official who will be designated by the applicant to have responsibility for implementing the station's program.

III. POLICY DISSEMINATION

The purpose of this section is to disclose the manner in which the station's EEO policy will be communicated to employees and prospective employees. The applicant's program should indicate whether it: (a) intends to utilize an employment application form which contains a notice informing job applicants that discrimination is prohibited and that persons who believe that they have been discriminated against may notify appropriate governmental agencies; (b) will post a notice which informs job applicants and employees that the applicant is an equal opportunity employer and that they may notify appropriate governmental authorities if they believe that they have been discriminated against; and (c) will seek the cooperation of labor unions, if represented at the station, in the implementation of its EEO program and in the inclusion of nondiscrimination provisions in union contracts. The applicant should also set forth any other methods it proposes to utilize in conveying its EEO policy (e.g., orientation materials, on-air announcements, station newsletter) to employees and prospective employees.

IV. RECRUITMENT

The applicant should specify the recruitment sources and other techniques it proposes to use to attract qualified minority and female job applicants. Not all of the categories of recruitment sources need be utilized. The purpose of the listing is to assist the applicant in developing specialized referral sources to establish a pool of qualified minorities and women who can be contacted as job opportunities occur. Sources which subsequently prove to be nonproductive should not be relied on and new sources should be sought.

V. TRAINING

Training programs are not mandatory. Each applicant is expected to decide, depending upon its own individual situation, whether a training program is feasible and would assist in its effort to increase the available pool of qualified minority and female applicants. Additionally, the applicant may set forth any other assistance it proposes to give to students, schools or colleges which is designed to be of benefit to minorities and women interested in entering the broadcasting field. The beneficiary of such assistance should be listed, as well as the form of assistance, such as contributions to scholarships, participation in work study programs, and the like.

MODEL EQUAL EMPLOYMENT OPPORTUNITY PROGRAM

I. GENERAL POLICY

It will be our policy to provide employment opportunity to all qualified individuals without regard to their race, color, religion, national origin or sex in all personnel actions including recruitment, evaluation, selection, promotion, compensation, training and termination.

It will also be our policy to promote the realization of equal employment opportunity through a positive, continuing program of specific practices designed to ensure the full realization of equal employment opportunity without regard to race, color, religion, national origin or sex.

To make this policy effective, and to ensure conformance with the Rules and Regulations of the Federal Communications Commission, we have adopted an Equal Employment Opportunity Program which includes the following elements:

II. RESPONSIBILITY FOR IMPLEMENTATION

(Name/Title) will be responsible for the administration and implementation of our Equal Employment Opportunity Program. It will also be the responsibility of all persons making employment decisions with respect to the recruitment, evaluation, selection, promotion, compensation, training and termination of employees to ensure that our policy and program is adhered to and that no person is discriminated against in employment because of race, color, religion, national origin or sex.

III. POLICY DISSEMINATION

To assure that all members of the staff are cognizant of our equal employment opportunity policy and their individual responsibilities in carrying out this policy, the following communication efforts will be made:

☐ The station's employment application form will contain a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they may notify the appropriate local State or Federal agency if they believe they have been the victims of discrimination.

☐ Appropriate notices will be posted informing applicants and employees that the station is an Equal Opportunity Employer and of their right to notify an appropriate local, State or Federal agency if they believe they have been the victims of discrimination.

☐ We will seek the cooperation of unions, if represented at the station, to help implement our EEO program and all union contracts will contain a nondiscrimination clause.

☐ Other (specify)

IV. RECRUITMENT

To ensure nondiscrimination in relation to minorities and women, and to foster their full consideration whenever job vacancies occur, we propose to utilize the following recruitment procedures:

☐ We will contact a variety of minority and women's organizations to encourage the referral of qualified minority and women applicants whenever job vacancies occur. Examples of organizations we intend to contact are:

☐ In addition to the organizations noted above, which specialize in minority and women candidates, we will deal only with employment services, including State employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex. Examples of these employment referral services are:

☐ When we recruit prospective employees from educational institutions such recruitment efforts will include area schools and colleges with minority and women enrollments. Educational institutions to be contacted for recruitment purposes are:

☐ When we place employment advertisements with media some of such advertisements will be placed in media which have significant circulation or viewership or are of particular interest to minorities and women. Examples of media to be utilized are:

☐ We will encourage employees to refer qualified minority and women candidates for existing and future job openings.

7. TRAINING

☐ Station resources and/or needs will be such that we will be unable or do not choose to institute programs for upgrading the skills of employees.

☐ We will provide on-the-job training to upgrade the skills of employees.

☐ We will provide assistance to students, schools, or colleges in programs designed to enable qualified minorities and women to compete in the broadcast employment market on an equitable basis:

School or Other Beneficiary	Proposed Form of Assistance
_____	_____
_____	_____
_____	_____

☐ Other (specify)

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

aperwork Reduction Act. Public reporting burden for this collection of information is estimated to average 1 hour per sponse. This includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data eeded, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other spect of this collection of information, including suggestions for reducing the burden, to the Federal Communications ommission, Information Resources Branch, Room 416, Paperwork Reduction Project, Washington, D.C. 20554, and to the ffice of Management and Budget, Paperwork Reduction Project (3060-0120), Washington, D.C. 20503.

The solicitation of personal information requested in this application is authorized by the Communications Act of 1934, as mended. The principal purpose for which the information will be used is to determine if the application requested is consistent with the public interest. The staff, consisting variously of attorneys, analysts, engineers, and applications examiners, will use the nformation to determine whether the application should be granted, denied, dismissed, or designated for hearing. If all the nformation requested is not provided, the application may be returned without action having been taken upon it or its rocessing may be delayed while a request is made to provide the missing information. Accordingly, every effort should be nade to provide all necessary information. Your response is required to obtain the requested authority.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3) AND THE PAPERWORK REDUCTION ACT OF 1980, P.L. 96-511, DECEMBER 11, 1980, 44 U.S.C. 3507.

APPENDIX D

Current Form 396

Federal Communications Commission
Washington, D.C. 20554

APPENDIX D

Approved by OMB
3060-0113
Expires 9/30/93

BROADCAST EQUAL EMPLOYMENT OPPORTUNITY PROGRAM REPORT

(To be filed with broadcast license renewal application)

(For FCC Use Only)
Code No.

Call Letters _____ _____

Name of Licensee _____

City and State which station is licensed to serve _____

TYPE OF BROADCAST STATION (Check one)

Commercial Broadcast Station		Noncommercial Broadcast Station
☐ AM	☐ TV	☐ Educational Radio
☐ FM	☐ Low Power TV	☐ Educational TV
☐ Combined AM & FM in same area	☐ International	

SEND NOTICES AND COMMUNICATIONS TO THE FOLLOWING NAMED PERSON AT THE ADDRESS INDICATED BELOW:

Name	Street Address		
City	State	ZIP Code	Telephone No. ( )

FILING INSTRUCTIONS

Broadcast station licensees are required to afford equal opportunity to all qualified persons and to refrain from discriminating in employment and related benefits on the basis of race, color, national origin, and sex. See Section 73.2080 of the Commission's Rules. Pursuant to these requirements, a license renewal applicant who employs five or more full-time station employees must file a report of its activities to ensure equal employment opportunity for women and minority groups (that is, Blacks not of Hispanic origin, Asians or Pacific Islanders, American Indians or Alaskan Natives, and Hispanics). If minority group representation in the available labor force is less than five percent (in the aggregate), equal employment opportunity (EEO) program information for minority group members need not be filed. However, EEO program information must be filed for women since they comprise a significant percentage of virtually all area labor forces. If an applicant employs fewer than five full-time employees, no equal employment opportunity activity information need be filed.

A copy of this report must be kept in the station's public file. These actions are required to obtain license renewal. Failure to meet these requirements may result in license renewal being delayed or denied. These requirements are contained in Section 73.2080 of the FCC Rules (47 CFR 73.2080), and are authorized by the Communications Act of 1934, as amended.

☐ If your station employs fewer than five full-time employees, check the box at left, complete the certification below, return the form to the FCC, and place a copy in your station's public file. You do not have to complete the rest of the form.

If your station employs five or more full-time employees, you must complete all of this form and follow all instructions.

☐ If minority group representation in the available labor force is less than 5 percent (in the aggregate) and you choose not to file EEO program information for minority groups, check the box at left and complete the rest of this form with only the information for your program directed towards women.

FCC 396
November 1990

CERTIFICATION

This report must be certified, as follows:

A. By licensee, if an individual;

B. By a partner, if a partnership (general partner, if a limited partnership);

C. By an officer, if a corporation or an association; or

D. By an attorney of the licensee, in case of physical disability or absence from the United States of the licensee.

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(a)(11), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

I certify to the best of my knowledge, information and belief, all statements contained in this report are true and correct.

Signed
Title
Date
Name of Respondent
Telephone No. (include area code)

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

The solicitation of personal information requested in this application is authorized by the Communications Act of 1934, as amended. The principal purpose for which the information will be used is to determine if the license renewal requested is consistent with the public interest. The staff, consisting variously of attorneys, accountants, engineers, and applications examiners, will use the information to determine whether the license renewal application should be granted, denied, dismissed or designated for hearing. If all the information requested is not provided, the application may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Accordingly, every effort should be made to provide all necessary information. Your response is required to obtain the requested authority.

Public reporting burden for this collection of information is estimated to average 3 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Federal Communications Commission, Office of Managing Director, Washington, DC 20554, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (3060-0113), Washington, DC 20503.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3) AND THE PAPERWORK REDUCTION ACT OF 1980, P.L. 96-511, DECEMBER 11, 1980, 44 U.S.C. 3507.

The purpose of this document is to remind broadcast station licensees of their equal employment opportunity responsibilities and to provide the licensee, the FCC and the public with information about whether the station is meeting these requirements.

GENERAL POLICY

A broadcast station must provide equal employment opportunity to all qualified individuals without regard to their race, color, religion, national origin or sex in all personnel actions including recruitment, evaluation, selection, promotion, compensation, training and termination.

A broadcast station must also encourage applications from qualified minorities and women for hiring and promotion to all types of jobs at the station.

I. RESPONSIBILITY FOR IMPLEMENTATION

A broadcast station must asign a particular official overall responsibility for equal employment opportunity at the station. That official's name and title are:

NAME _____ TITLE _____

It is also the responsibility of all persons at a broadcast station making employment decisions with respect to recruitment, evaluation, selection, promotion, compensation, training and termination of employees to ensure that no person is discriminated against in employment because of race, color, religion, national origin or sex.

II. POLICY DISSEMINATION

A broadcast station must make effective efforts to make management, staff, and prospective employees aware that it offers equal employment opportunity. The Commission considers the efforts listed below to be generally effective. Indicate each practice that your station follows. You also may list any other efforts that you have undertaken.

☐ Notices are posted informing applicants and employees that the station is an Equal Opportunity Employer and that they have the right to notify an appropriate local, State, or Federal agency if they believe they have been the victims of discrimination.

☐ Our station's employment application form contains a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they may notify the appropriate local, State, or Federal agency if they believe they have been the victims of discrimination.

☐ We seek the cooperation of the unions represented at the station to help implement our EEO program and all union contracts contain a nondiscrimination clause.

☐ Other (specify)

III. RECRUITMENT

A broadcast station must make efforts to attract qualified minority and women applicants for all types of jobs at the station whenever vacancies occur.

Indicate each practice that your station follows and, where appropriate, list sources and numbers of referrals.

☐ When we place employment advertisements with media some of such advertisements are placed with media which have significant circulation or viewership, or are of particular interest to minorities and women in the recruitment area. Examples of media utilized during the past 12 months and the number of minority and/or women referrals are:

	Number of Referrals	
	Minority	Women
_____	_____	_____
_____	_____	_____

☐ Recruit prospective employees from educational institutions, including area schools and colleges with minority and women enrollments. Educational institutions contacted for recruitment purposes during the past 12 months and the number of minority and/or women referrals are:

Educational Institution	Number of Referrals Minority	Women
_____	_____	_____
_____	_____	_____

☐ Contact a variety of minority and women's organizations to encourage the referral of qualified minority and women applicants whenever job vacancies occur. Examples of such organizations contacted during the past 12 months are:

Organization	Number of Referrals Minority	Women
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

☐ We encourage present employees to refer qualified minority and women candidates for job openings. The number of minority and/or women referrals are: Minority _____ Women _____

☐ Other (specify) and the number of minority and/or women referrals are: Minority _____ Women _____

IV. JOB HIRES

A broadcast station must consider applicants for job openings on a nondiscriminatory basis. Further, to assure that qualified minorities and women are given due consideration for available positions, it must make efforts to encourage them to apply for job openings.

During the twelve-month period prior to filing this application beginning (Month-Day-Year) _____ and ending (Month-Day-Year), _____ we hired:

Total hires _____ Minorities _____ Women _____

During this period, for positions in the upper four job categories, we hired:

Total hires, upper four categories _____ Minorities _____ Women _____

V. PROMOTIONS

A broadcast station must promote individuals on a nondiscriminatory basis. Further, to assure that qualified minorities and women are given due consideration for promotional opportunities, it must make efforts to encourage them to qualify and apply for advancement.

During the twelve-month period prior to filing this application beginning (Month-Day-Year) _____ and ending (Month-Day-Year) _____, we promoted:

Total promotions _____ Minorities _____ Women _____

During this period, in the upper four job categories, we promoted:

Total promotions, upper four categories _____ Minorities _____ Women _____

VI. AVAILABLE LABOR FORCE

A broadcast station must evaluate its employment profile and job turnover against the availability of minorities and women in the relevant labor market. The FCC will use labor force data for the MSA in which your station is located, or county data if the station is not located in an MSA, to evaluate your station's equal employment efforts. If you use these data in your evaluation, you need not submit them to the FCC.

This section is optional.

As an alternative to MSA or county labor force data, you may use other data that more accurately reflect the percentages of women and minorities in the labor force available to your station. If such alternative data are used, that data must be submitted on the table below and an explanation attached as to why they are more appropriate.

Percentage in the Labor Force	Women	Blacks not of Hispanic Origin	Asian or Pacific Islanders	American Indians or Alaskan Natives	Hispanics

The above information is for: ☐ M.S.A. ☐ City ☐ County

☐ Other (specify)

VII. COMPLAINTS

You must provide here a brief description of any complaint which has been filed before any body having competent jurisdiction under Federal, State, territorial or local law, alleging unlawful discrimination in the employment practices of the station including the persons involved, the date of filing, the court or agency, the file number (if any), and the disposition or current status of the matter. Examples of such jurisdiction may include the Equal Employment Opportunity Commission, state and local equal opportunity commissions, or other appropriate agencies.

VIII. OTHER INFORMATION

You may also describe other information that you believe would allow the FCC to evaluate more completely your efforts in providing equal opportunity in employment at your station. Submission of such information is optional. Among the additional information you may choose to provide are:

Any training programs the station has undertaken that are designed to enable minorities and women to compete in the broadcast employment market including, but not necessarily limited to, on-the-job training and assistance to students, schools or colleges.

Any problems the station has experienced in assuring equal employment opportunity, or attracting qualified minority and women candidates for employment or promotion.

Any efforts the station has undertaken or will undertake to promote equal opportunity in its employment and to encourage applications from minorities and women.

APPENDIX E

Current Form 395-B

Federal Communications Commission
Washington, D.C. 20554

BROADCAST STATION
ANNUAL EMPLOYMENT REPORT 1992

Approved by OMB
3060-0390
Expires 6/30/93

(For FCC Use Only)
Code No.

SECTION I

A. Name of Licensee or Permittee	B. Address

SECTION II

A. TYPE OF RESPONDENT (check ONLY one)

COMMERCIAL BROADCAST STATION				NONCOMMERCIAL BROADCAST STATION		HEADQUARTERS	
AM	☐ AM	TV	☐ TV	ER	☐ Educational AM or FM Radio	HQ	☐
FM	☐ FM	LP	☐ Low Power TV	ET	☐ Educational TV		
AF	☐ Combined AM & FM in same area (must file a combined report)	IN	☐ International				

B. List call letters and location(s) of included stations. AM station is to be listed first in a combined report. Provide former call letters for each station if changed since last 395-B report.

CURRENT CALL LETTERS	LOCATION(S)	FORMER CALL LETTERS

SECTION III

A. PAY PERIOD COVERED BY THIS REPORT (DATE) _____

B. CHECK APPLICABLE BOX

☐ Fewer than five full-time employees during the selected payroll period (Complete page one only and certification statement and return to FCC)

☐ Five or more full-time employees during selected payroll period (Complete all sections of form and certification statement and return to FCC)

SECTION IV CERTIFICATION

This report must be certified, as follows: (a) By licensee, if an individual; (b) By a partner, if a partnership (general partner, if a limited partnership); (c) By an officer, if a corporation or an association; or (d) By an attorney of the licensee, in case of physical disability or absence from the United States of the licensee.

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

I certify to the best of my knowledge, information and belief, all statements contained in this report are true and correct.

Signed _____ Title _____

Print Name _____ Date _____ Telephone No. (____) _____

FCC 395-B
March 1992

SECTION V - EMPLOYEE DATA

A. FULL-TIME PAID EMPLOYEE DATA

JOB CATEGORIES	TOTAL (a-j)	MALE					FEMALE				
		WHITE (NOT HISPANIC) (a)	BLACK (NOT HISPANIC) (b)	HISPANIC (c)	ASIAN OR PACIFIC ISLANDER (d)	AMERICAN INDIAN, ALASKAN NATIVE (e)	WHITE (NOT HISPANIC) (f)	BLACK (NOT HISPANIC) (g)	HISPANIC (h)	ASIAN OR PACIFIC ISLANDER (i)	AMERICAN INDIAN, ALASKAN NATIVE (j)
OFFICIALS & MANAGERS											
PROFESSIONALS											
TECHNICIANS											
SALES WORKERS											
OFFICE & CLERICAL											
CRAFT WORKERS (SKILLED)											
OPERATIVES (SEMI-SKILLED)											
LABORERS (UNSKILLED)											
SERVICE WORKERS											
TOTAL											

B. PART-TIME PAID EMPLOYEE DATA

JOB CATEGORIES	TOTAL (a-j)	MALE					FEMALE				
		WHITE (NOT HISPANIC) (a)	BLACK (NOT HISPANIC) (b)	HISPANIC (c)	ASIAN OR PACIFIC ISLANDER (d)	AMERICAN INDIAN, ALASKAN NATIVE (e)	WHITE (NOT HISPANIC) (f)	BLACK (NOT HISPANIC) (g)	HISPANIC (h)	ASIAN OR PACIFIC ISLANDER (i)	AMERICAN INDIAN, ALASKAN NATIVE (j)
OFFICIALS & MANAGERS											
PROFESSIONALS											
TECHNICIANS											
SALES WORKERS											
OFFICE & CLERICAL											
CRAFT WORKERS (SKILLED)											
OPERATIVES (SEMI-SKILLED)											
LABORERS (UNSKILLED)											
SERVICE WORKERS											
TOTAL											

APPENDIX F

Current Form 395-A

Cable Television Annual Employment Report 1992

FCC FORM 395-A

Approved by OMB
3060-0095
Expires 3/31/92

See Instructions for information regarding public burden estimate

Submit the original and one copy by May 1 to:

Federal Communications Commission
Room 7218
Washington, D.C. 20554

For FCC Use Only
Emp. Unit ID # _____
( ) Supplemental Investigation Sheet (SIS) Attached

SECTION I IDENTIFYING INFORMATION

A. Name of Operator: _____

MSO Name: _____

B. Employment Unit's Mailing Address

_____

_____

C. County and State in which unit's employment office is located

_____

D. Category of Respondent (check applicable box)

( ) Fewer than six (6) full-time employees during the selected payroll period: Complete Sections I, II and VII

( ) Six (6) or more full-time employees during the selected payroll period: Complete ALL sections of the Form 395-A and the Supplemental Investigation Sheet, if attached

E. Pay Period Covered by this Report (Inclusive dates)

_____

F. Attachments: (Check applicable boxes)

Not Applicable	Attached	Exhibit - For:
( )	( )	A-Section II
( )	( )	B-Section III
( )	( )	C-Section IV
( )	( )	D-Section VI
( )	( )	E-SIS - Job Descriptions
( )	( )	F-SIS Narrative Responses

SECTION II COMMUNITY INFORMATION

System Communities Comprising Local Employment Unit

Ident No.	Name of Community	Location (State)	Type

Review the list of communities served on the previous year's submission and attach as Exhibit A any additions or deletions, using the format noted above.

Check YES or NO to each of the following questions. If answer to any question below is NO, attach as EXHIBIT B an explanation.

YES	NO		
( )	( )	1.	Do you disseminate your EEO Program to job applicants, employees, and those with whom you regularly do business?
( )	( )	2.	Do you contact minority organizations, women's organizations, media, educational institutions, and other potential sources of minority and female applicants for referrals whenever job vacancies are available in your organization?
( )	( )	3.	Do you evaluate your employment profile and job turnover against the availability of minorities and women in your franchise area?
( )	( )	4.	Do you undertake to offer promotions to positions of greater responsibility to minorities and women in a nondiscriminatory manner?
( )	( )	5.	To the extent possible, do you seek out minority and female entrepreneurs and encourage them to conduct business with all parts of your organization?
( )	( )	6.	Do you analyze the results of your efforts to recruit, hire, promote, and use the services of minorities and women and use these results to evaluate and improve your EEO Program?
( )	( )	7.	Do you define the responsibility of each level of management to ensure a positive application and vigorous enforcement of your policy of equal employment opportunity and maintain a procedure to review and control managerial and supervisory performance?
( )	( )	8.	Do you conduct a continuing program to exclude every form of prejudice or discrimination based upon race, color, religion, national origin, age, or sex from your personnel policies and practices and working conditions?
( )	( )	9.	Do you conduct a continuing review of job structure and employment practices and maintain positive recruitment training, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility?

SECTION IV ADDITIONAL INFORMATION

You may provide as Exhibit C any additional information that you believe might be useful in evaluating your efforts to comply with the Commission's EEO provisions. There is no requirement to provide additional data or information.

SECTION V EMPLOYEE DATA

SECTION VI AVAILABLE LABOR FORCE AND OCCUPATIONAL AVAILABILITY DATA

A. Full-Time and Part-Time Paid Employee Data

	JOB CATEGORIES	TOTAL (b-k) (a)	MALE					FEMALE					Women (A)	Blacks (B)	Hispanics (C)	Asian (D)	American Indian (E)
			White (Not Hispanic) (b)	Black (Not Hispanic) (c)	Hispanic (d)	Asian or Pacific Islander (e)	American Indian, Alaskan Native (f)	White (Not Hispanic) (g)	Black (Not Hispanic) (h)	Hispanic (i)	Asian or Pacific Islander (j)	American Indian, Alaskan Native (k)					
1.	Officials & Managers																
2.	Professionals																
3.	Technicans																
4.	Sales Workers																
5.	Office and Clerical																
6.	Craft Workers (Skilled)																
7.	Operatives (Semi-skilled)																
8.	Laborers (Unskilled)																
9.	Service Workers																
10.	Total																

SOURCE: Name of area: (e.g., Adams County, PA, or New York City PMSA)

B. Employee Promotions By Upper Four Job Categories and Total (Data for 12 months)

Upper Four												
Total												

Attach as Exhibit D reasons for use of other labor force data

C. Job Hires By Upper Four Job Categories and Total (Data for 12 months)

Upper Four												
Total												

Emp. Unit ID # _____

SECTION VII CERTIFICATION

This Report must be certified as follows:

A. By the individual owning the reporting system if individually owned;

B. By a partner, if a partnership; or

C. By an officer, if a corporation or association.

I certify that to the best of my knowledge, information and belief, all statements contained in this report are true and correct.

Signed _____ Title _____

Date _____ Name of Respondent _____

Telephone No. (include area code)_____

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE OR IMPRISONMENT. 18 U.S.C. 1001.

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

The solicitation of personal information requested in this application is authorized by the Communications Act of 1934, as amended. The principal purpose for which the information will be used is to determine if the benefit requested is consistent with the public interest. The staff, consisting variously of attorneys, accountants, engineers, and applications examiners, will use the information to determine whether the application should be granted, denied, dismissed, or designated for hearing. If all the information requested is not provided, the application may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Accordingly, every effort should be made to provide all necessary information. Your response is required to retain the authority you have been granted. Voluntary responses are so identified.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 95-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3) AND THE PAPERWORK REDUCTION ACT OF 1980, P.L. 96-511, DECEMBER 11, 1980, 44 U.S.C. 3507.

APPENDIX G

Proposed Form 395-A

SECTION V EMPLOYEE DATA

SECTION VI AVAILABLE LABOR FORCE AND OCCUPATIONAL AVAILABILITY DATA

FULL-TIME EMPLOYEE DATA

A.

		MALE					FEMALE									
Job Categor.	T b-k (a)	W (b)	B (c)	H (d)	A (e)	AI (f)	W (g)	B (h)	H (i)	A (j)	AI (k)	WOM (A)	B (B)	H (C)	A (D)	AI (E)
Off. & Managers																
Prof.																
Tech.																
Sales Workers																
Office & Clerical																
Craft Workers																
Oper. (s-skill)																
Laborers (unskill)																
Service Workers																
Total																

SOURCE: Name of area: (e.g., Adams County, PA, or New York City PMSA)

B. EMPLOYEE PROMOTIONS BY UPPER LEVEL JOB CATEGORIES AND TOTAL (DATA FOR 12 MONTHS)

Upper Level											
Total											

Attach as Exhibit D reasons use of other labor force data.

C. JOB HIRES BY UPPER LEVEL JOB CATEGORIES AND TOTAL (DATA FOR 12 MONTHS)

Upper Level											
Total											

Emp. Unit ID #_____

PART-TIME EMPLOYEE DATA

D.

Job Categor.	T b-k (a)	MALE W (b)	MALE B (c)	MALE H (d)	MALE A (e)	MALE AI (f)	FEMALE W (g)	FEMALE B (h)	FEMALE H (i)	FEMALE A (j)	FEMALE AI (k)	WOM (A)	B (B)	H (C)	A (D)	AI (E)
Off. & Managers																
Prof.																
Tech.																
Sales Workers																
Office & Clerical																
Craft Workers																
Oper. (s-skill)																
Laborers (unskill)																
Service Workers																
Total																

SOURCE: Name of area: (e.g., Adams County, PA, or New York City PMSA)

E. PART-TIME EMPLOYEE PROMOTIONS BY UPPER LEVEL JOB CATEGORIES AND TOTAL (DATA FOR 12 MONTHS)

Upper Level												
Total												

Attach as Exhibit D reasons use of other labor force data

F. PART-TIME JOB HIRES BY UPPER LEVEL JOB CATEGORIES AND TOTAL (DATA FOR 12 MONTHS)

Upper Level												
Total												

Emp. Unit ID #_____

SECTION VII EMPLOYMENT, PROMOTION, HIRING AND RECRUITMENT DATA FOR SENIOR UPPER-LEVEL SUB-CATEGORIES

A. Instructions -- For each subcategory listed below, provide the number of persons employed, indicating gender and race or national origin during the relevant payroll period. In addition, for each subcategory, list all employees promoted and hired, indicating gender and race or national origin (Data for 12 months).

1. CORPORATE OFFICERS

		MALES					FEMALES				
	T b-k (a)	W (b)	B (c)	H (d)	A (e)	AI (f)	W (g)	B (h)	H (i)	A (j)	AI (k)
Employees											
Promotion											
Hires											

2. GENERAL MANAGER

		MALES					FEMALES				
	T b-k (a)	W (b)	B (c)	H (d)	A (e)	AI (f)	W (g)	B (h)	H (i)	A (j)	AI (k)
Employees											
Promotion											
Hires											

3. CHIEF TECHNICIAN

		MALES					FEMALES				
	T b-k (a)	W (b)	B (c)	H (d)	A (e)	AI (f)	W (g)	B (h)	H (i)	A (j)	AI (k)
Employees											
Promotion											
Hires											

4. COMPTROLLER

		MALES					FEMALES				
	T b-k (a)	W (b)	B (c)	H (d)	A (e)	AI (f)	W (g)	B (h)	H (i)	A (j)	AI (k)
Employees											
Promotion											
Hires											

5. GENERAL SALES MANAGER

		MALES					FEMALES				
	T b-k (a)	W (b)	B (c)	H (d)	A (e)	AI (f)	W (g)	B (h)	H (i)	A (j)	AI (k)
Employees											
Promotion											
Hires											

6. PRODUCTION MANAGER

		MALES					FEMALES				
	T b-k (a)	W (b)	B (c)	H (d)	A (e)	AI (f)	W (g)	B (h)	H (i)	A (j)	AI (k)
Employees											
Promotion											
Hires											

B. RECRUITMENT INFORMATION. Please provide a narrative detailing the specific recruitment efforts undertaken for each position within the six sub-categories filled by a new hire. Please include: the recruitment sources contacted for each position; the number of referrals received for each recruitment source (indicating those that were minority and female); the number of applicants received for each position as well as those that were interviewed (indicating those that were female and minority); and the referral source of each successful candidate.

SECTION VIII - JOB TITLE INFORMATION

For <u>each</u> job category, please provide, by job title, the number, gender and race or national origin of employees for each of the above-listed job categories. Reprint and use additional sheets as necessary.

JOB CATEGORY:						
Job Titles	Total	Women	Blacks	Hisp.	Asians	A.I.

APPENDIX H

Proposed Rule Changes

A. Part 1 - Practice and Procedure

B. Part 73 - Radio Broadcast Service

C. Part 76 - Cable Television Service

D. Part 100 - Direct Broadcast Satellite Service

APPENDIX H

I. Parts 1, 73, 76 and 100 of Chapter I of Title 47 of the Code of Federal Regulations are proposed to be amended to read as follows:

A. Part 1 - Practice and Procedure

The authority citation for Part 1 would continue to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; implemented by 5 U.S.C. 552, unless otherwise noted.

1. Subpart E - Complaints, Applications, Tariffs, and Reports Involving Common Carriers.

a. Miscellaneous Reports

1) Section 1.815 Reports of annual employment

a) Paragraph (a) is proposed to be amended as follows:

(a) Except as provided below in paragraph (c), each ...."

b) A new paragraph (c) is proposed to be added as follows:

(c) Each licensee or permittee of an MMDS system shall be subject to the EEO requirements as set forth in Part 76, Subpart E of these rules. As such, each licensee or permittee with six or more full-time employees shall file with the Commission on or before May 1st of each year, on FCC Form 395-A, an annual employment report.

B. Part 73 - Radio Broadcast Services

The authority citation for Part 73 would continue to read as follows:

Authority: Sections 4 and 303, as amended; 47 U.S.C. Sections 154, 303.

1. Subpart H - Rules Applicable to All Broadcast Stations

a. Section 73.2080 Equal Employment Opportunities

1) A new paragraph (d) entitled Mid-Term Review for Television Broadcast Stations is proposed to be added as follows:

Section 73.2080

(d) Mid-term Review for Television Broadcast Stations The Commission will conduct a mid-term review of the employment practices of each broadcast television station at two and one half years following the station's most recent license expiration date. The Commission will use the employment profile information provided on the first two Form 395-B reports submitted following such license expiration date to determine whether television stations' employment practices as compared to applicable labor force data, are in compliance with the Commission's processing criteria. Broadcast television stations found to fall below the processing criteria will receive a letter noting any necessary improvements identified as a result of the review.

C. Part 76 - Cable Television Service

The authority citation for Part 76 would continue to read as follows:

Authority: Sections 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. 152, 153, 154, 301, 307, 308, 309.

1. Subpart A - General

a. Section 76.5 is proposed to be amended by adding paragraph (jj) to read as follows:

Section 76.5 Definitions

(jj) Multichannel video programming distributor A person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.

2. Subpart E - Equal Employment Opportunity Requirements

a. Section 76.71 is proposed to be amended by amending paragraph (a) by adding at the end of the paragraph, before the period:

(a) ....and any multichannel video programming distributor.

b. Section 76.77 is proposed to be amended by adding paragraph (d) to read as follows:

Section 76.77 Reporting Requirements

(d) Job Category Definitions. The following job category definitions are to be used when classifying employees for purposes of this section:

(1) Corporate Officers. Employee with official authorization to represent the company in a fiduciary capacity.

(2) General Manager. Employee who exercises overall responsibility for a cable unit or system.

(3) Chief Technician. Employee who supervises all technical personnel and maintains the quality and consistency of pictures to cable

television subscribers.

(4) Comptroller. Employee who manages the activities of the accounting department in the maintenance of the accounting book and other such records.

(5) General Sales Manager. Employee who selects, trains, supervises and coordinates the direct sales efforts of the unit or system.

(6) Production Manager. Employee who supervises and schedules the activities of production personnel in the creation of local community programming.

(7) Managers. Occupations requiring administrative personnel who set broad policies, exercise overall responsibility for execution of these policies, and direct individual departments or special phases of a firm's operations. This category would include systems managers and assistant managers, program directors and assistant directors, office managers, budget officers, promotion managers, public affairs directors, chief engineers and those holding equivalent positions.

(8) Professionals. Occupations requiring either college graduation or experience of such kind and amount as to provide a comparable background. Includes: accountants and auditors, editors, engineers, lawyers and labor relations specialists. This category would include persons engaged in the writing, preparation and reproduction of programming; writers or editors, producers and directors of programs, floor directors, announcers, singers, actors, music librarians and those in similar positions.

(9) Technical. Occupations requiring a combination of basic scientific knowledge and manual skill which can be obtained through about 2 years of post high school education, such as is offered in many technical institutes and junior colleges, or through equivalent on-the-job training. Includes: computer programmers and operators, engineering aides, junior engineers and electronic technicians. This category would include air and mappers, audio and video engineers, camera technicians (live or film), film processors and light technicians.

(10) Sales. Occupations engaging wholly or primarily in direct selling. This category would include advertising agents and cable service sales personnel (sales representatives).

(11) Office and Clerical. Includes all clerical-type work regardless of level of difficulty, where the activities are predominantly nonmanual though some manual work not directly involved with altering or transporting the products is included. Includes: bookkeepers, cashiers, collectors of bills and accounts, messengers and clerks, office machine operators, stenographers, typists and secretaries, telephone operators and kindred workers.

(12) Craft Workers (skilled). Manual workers of relatively high skill level having a thorough and comprehensive knowledge of the processes involved in their work. Exercise considerable independent judgment and usually receive an extensive period of training. Includes: hourly paid supervisors who are not members of management, mechanics and repair workers,

electricians and motion picture projectionists.

(13) Operatives (semi-skilled). Workers who operate machine or processing equipment or perform other factory-type duties of intermediate skill level which can be mastered in a few weeks and require only limited training. Includes: apprentices, operatives, truck and tractor drivers, welders, installers, line workers, splicers and trenching machine operators.

Note: Apprentices are persons employed in a program including work training and related instruction to learn a trade or craft which is traditionally considered an apprenticeship regardless of whether the program is registered with a Federal or State Agency.

(14) Laborers (unskilled). Workers in manual occupations which generally require no special training. Perform elementary duties that may be learned in a few days and require the application of little or no independent judgment. Includes: gardeners and groundskeepers, laborers performing lifting or digging, stage hands and kindred workers.

(15) Service Workers. Workers in both protective and nonprotective service occupations. Includes: char workers and cleaners, elevator operators, guards and watch workers, janitors, and kindred workers.

Note: A person who does more than one job is to be listed in the job category which represents the most frequently performed task by that person; with the exception of persons within the first six categories, a person is to be listed only once. Specific job titles listed in the categories above are merely illustrative. The proper categorization

of any employee depends on the kind and level of the employee's responsibilities.

D. Part 100 - Direct Broadcast Satellite Service

The authority citation for Part 100 would continue to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

1. Subpart D - Operating Requirements

a. Section 100.51 Equal employment opportunities

1) Paragraph (d) is proposed to be amended as follows:

Each licensee or permittee with six or more full-time employees shall file an annual employment report with the FCC on or before May 1st of each year on FCC Form 395-A in accordance with the EEO provisions as set forth in Part 76, Subpart E of these rules.

2) Paragraph (e) is proposed to be added as follows:

Each station shall be subject to the requirements and review as set forth in Part 76, Subpart E of these rules.

APPENDIX I

Example of Current Labor Force Statistics for Job Categories

SECTION V EMPLOYEE DATA

SECTION VI AVAILABLE LABOR FORCE AND OCCUPATIONAL AVAILABILITY DATA

A. Full-Time and Part-Time Paid Employee Data

	JOB CATEGORIES	TOTAL (b-k) (a)	MALE					FEMALE					Women (A)	Blacks (B)	Hispanics (C)	Asian (D)	American Indian (E)
			White (Not Hispanic) (b)	Black (Not Hispanic) (c)	Hispanic (d)	Asian or Pacific Islander (e)	American Indian, Alaskan Native (f)	White (Not Hispanic) (g)	Black (Not Hispanic) (h)	Hispanic (i)	Asian or Pacific Islander (j)	American Indian, Alaskan Native (k)					
1.	Officials & Managers	3	2					1					25.4	11.4	3.6	0.4	0.2
2.	Professionals												48.5	18.2	3.3	1.1	0.0
3.	Technicians	2	1	1									42.6	20.1	3.9	1.3	0.1
4.	Sales Workers	3						2	1				52.8	16.9	4.0	0.6	0.2
5.	Office and Clerical												74.9	22.6	3.9	0.6	0.1
6.	Craft Workers (Skilled)												5.1	19.9	4.4	0.6	0.2
7.	Operatives (Semi-skilled)	4	3	1									17.2	41.6	4.5	1.3	0.3
8.	Laborers (Unskilled)												11.4	47.1	4.6	1.7	0.3
9.	Service Workers												58.2	50.9	4.2	0.8	0.2
10.	Total	12	6	2				3	1				41.2	27.2	4.0	0.9	0.2

SOURCE: Name of area: (e.g., Adams County, PA; or New York City PMSA)

NEW ORLEANS, LOUISIANA (P)MSA 5560

Attach as Exhibit D reasons for use of other labor force data

B. Employee Promotions By Upper Four Job Categories and Total (Data for 12 months)

Upper Four	1	1										
Total	1	1										

C. Job Hires By Upper Four Job Categories and Total (Data for 12 months)

Upper Four	1							1				
Total	2	1						1				

Emp. Unit ID # _____

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 5, 1992

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Alexsii Corporation - Request for refund of the hearing fee for a new FM station at Temecula, California - **Granted** (November 30, 1992).

Atkins, T. Kent, d/b/a Atkins Broadcasting - Request for refund of a hearing fee for a station at Amarillo, Texas - **Granted** (December 15, 1992).

Kennedy Broadcasting, Inc.- Request for refund of a hearing fee for a new FM station at Martinez, Georgia - **Denied** (November 30, 1992).

Rees, John Harvey - Request for refund of a hearing fee for a new television station at Grand Junction, Colorado - **Granted** (December 15, 1992).

Samet, Stephen W. - Request for refund of a hearing fee for a station at Oglesby, Illinois - **Granted** (December 21, 1992).

Williams Broadcasting Group - Request for refund of hearing fees for a new FM station at Amarillo, California and a FM station at Slaton, Texas - **Granted** (December 3, 1992).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202)632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 30 1992

James L. Winston, Esq.
Rubin, Winston, Diercks,
Harris & Cooke
1730 M St., N.W.
Suite 412
Washington, D.C. 20036

Dear Mr. Winston:

This is in response to your request for a refund of the hearing fee submitted by Alexsii Corporation ("Alexsii"), applicant for a new FM station in Temecula, California.

You state that the Alexsii application was dismissed in a Hearing Designation Order, designating other mutually exclusive applications for the Temecula, California FM frequency. The reason given for the dismissal was that Alexsii had not timely filed its hearing fee. Although Alexsii sought reconsideration of the determination, such reconsideration was denied. Now, you state that Alexsii is entitled to a refund pursuant to Section 1.1111 of the Commission's Rules because Alexsii's application was dismissed prior to hearing.

Section 1.1111(b)(2) of the Commission's Rules provides for a refund of the hearing fee whenever an application is dismissed prior to designation for hearing or in the order designating the application for hearing. 47 C.F.R. § 1.1111(b)(2). Here, Alexsii's application was dismissed in the HDO. Accordingly, Alexsii is entitled to a refund.

A check drawn in the amount of $6,760.00 and made payable to the maker of the original check will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 13 1992

James L. Oyster, Esq.
Route 1, Box 203A
Castleton, Virginia 22716

Dear Mr. Oyster:

This will respond to your request for refund of a hearing fee filed on behalf of T. Kent Atkins, d/b/a Atkins Broadcasting, in connection with his successful renewal application for Station KRGN, Amarillo, Texas.

You state that prior to designation for hearing, Atkins entered into settlement agreement with the challenging mutually exclusive applicant. The settlement agreement was approved, the mutually exclusive application was dismissed, and the matter was not designated for hearing. Under the circumstances, refund of the hearing fee is appropriate. See 47 C.F.R. §1.1111(c)(2); see also Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 158 (1990).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00 will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 30 1992

John P. Bankson, Esquire
Hopkins & Sutter
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Dear Mr. Bankson:

This is in response to your request for refund of a hearing fee filed by Kennedy Broadcasting, Inc. (Kennedy), successful applicant for a new FM station at Martinez, Georgia.

You state that Kennedy was designated for a comparative hearing to select the licensee for the station at Martinez. Kennedy and those competing applicants that had timely filed their hearing fees submitted a settlement agreement providing that Kennedy would be the surviving applicant. Kennedy was conditionally awarded a construction permit for the station at Martinez, subject to the disposition of an appeal by an applicant previously dismissed from the proceeding. Subsequently, Kennedy entered into a separate settlement agreement with that applicant which the Mass Media Bureau approved and the competitor's application was dismissed. You request the refund because Kennedy's application was granted pursuant to the terms of the settlement agreement.

Section 1.1111(b)(4) of the Commission's rules provides for the refund of a hearing fee filed by the surviving applicant in a settlement agreement if its application is "immediately grantable". See 47 C.F.R. § 1.1111(b)(4). Our review of this matter discloses that the designation order in this proceeding specified an air hazard issue against Kennedy's application and that Kennedy filed the required amendment and a request for summary judgement on the issue. See Hearing Designation Order in MM Docket No. 91-203, 6 FCC Rcd 4446 (1991). In his Order conditionally granting Kennedy a construction permit, the presiding Administrative Law Judge also granted Kennedy's motion for summary judgment. See Order, FCC 91M-3058, released October 10, 1991. Accordingly, Kennedy is not entitled to a refund because its application was not ready for "immediate grant" at the time Notices of Appearance were due in the proceeding since its outstanding air hazard issue had not then been resolved. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1990), Recon. in Part, 6 FCC Rcd 5919, 5925 (1991).

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

DEC 15 1992

OFFICE OF
MANAGING DIRECTOR

B. Jay Baraff, Esq.
Baraff, Koerner, Olender & Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003

Dear Mr. Baraff:

This will respond to your request for refund of hearing fee filed on behalf of John Harvey Rees in connection with his construction permit application for a new television station at Grand Junction, Colorado.

You state, and your documentation demonstrates, that prior to designation for hearing the Commission dismissed the application of the competing applicant for failure to submit its hearing fee. On November 29, 1992, the Commission subsequently granted the application of Mr. Rees.

Under the circumstances, since Mr. Rees' application was granted without being designated for hearing, refund of the hearing fee is appropriate. See 47 C.F.R. § 1.1111(c)(1).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 2 1 1992

Rebecca L. Dorch, Esq.
Bryan Cave
700 Thirteenth Street, N.W.
Washington, D.C. 20005-3960

Re: Stephen W. Samet
Channel 271A, Oglesby, IL
#9203028170334004

Dear Ms. Dorch:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. § 1.1111. The subsection checked below is specifically applicable to your request.

____ No fee is required for the above referenced submission (§1.1111(a)(1)).

____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

____ The applicant cannot fulfil the prescribed age requirement (§1.1111(a)(3)).

____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(6)).

____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(3)).

_X_ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but one application, and that application was immediately grantable (§1.1111(b)(4)).

____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but one application and that application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 3 1992

John E. Hoover, Esq.
Jones, Day, Reavis
& Pogue
1450 G Street, N.W.
Washington, D.C. 20005-2088

Dear Mr. Hoover:

This will respond to your request for refund of hearing fees filed on behalf of Williams Broadcasting Group ("Williams") in connection with its construction permit application for a new FM station at Amarillo, Texas, as well as its renewal application for Station KJAK (FM), Slaton, Texas.

You state, and your documentation demonstrates that, prior to designation for hearing, Williams entered into settlement agreements with the mutually exclusive applicants in each matter. The settlement agreements were approved, the mutually exclusive applications were dismissed, and the matters were not designated for hearing. Under the circumstances, refund of the hearing fees is appropriate. See 47 C.F.R. § 1.1111(c)(2); see also Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 158 (1990).

Accordingly, your request is granted. Checks, made payable to the makers of the original checks and each drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

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